LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
NOV 8 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 307

MABEL V. ROMAN, Clerk of the Peace for New Castle County; WALTER A. HANDSBERRY, Clerk of the Peace for Kent County; I. ROBERT WILLEY, Clerk of the Peace for Sussex County; *et als., Appellants,*

v.

RICHARD SINCOCK, *et als.*

On Appeal from the United States District Court for the District of Delaware

BRIEF FOR THE APPELLANTS

DAVID P. BUCKSON,
Attorney General of the State of Delaware,
Dover, Delaware,

E. NORMAN VEASEY,
Chief Deputy Attorney General of the State of Delaware,
Public Building,
Wilmington 1, Delaware,

FREDERICK BERNAYS WIENER,
1025 Connecticut Avenue, N.W.,
Washington 36, D. C.,

JANUAR D. BOVE, JR.,
Beneficial Building,
Wilmington 99, Delaware,

JAMES H. HUGHES, III,
325 South State Street,
Dover, Delaware,

FRANK O'DONNELL,
Delaware Trust Building,
Wilmington 1, Delaware,

N. MAXSON TERRY,
48 The Green,
Dover, Delaware,

Counsel for the Appellants.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	3
Constitutional provisions involved	4
Statement	4
A. Delaware apportionment when suit was brought	5
B. Initial steps in present action; Delaware Constitution amended	6
C. Further motions; trial	10
D. Counties in Delaware history and law	13
E. Opinion, decree and injunction below	17
Summary of Argument	19
Argument	29
I. The Federal analogy of area representation in the Senate of the United States is fully and exactly applicable in Delaware, where counties were never creatures of the State, but where, to the contrary, the State was created in September 1776 by the then existing sovereign Three Lower Counties	33
II. Adoption by a State of the Federal plan for the composition of its legislature, whereby one house is apportioned by political subdivisions rather than by population, does not now, and as demonstrated by contemporaneous Congressional legislation never did, violate the Equal Protection Clause	53
A. Contemporaneous Congressional legislation readmitting the former Confederate States establishes conclusively that State constitutions providing for senates apportioned on an area basis were never deemed to violate the Equal Protection Clause	55

Page

B. The contrary view of the court below involves two unacceptable incongruities, first that the permanent guaranty in the Constitution of the United States of two senators to every State violates the rights under the same Constitution of the people of the more populous States, second that the principle of checks and balances written into the Constitution of the United States is unconstitutional under the same instrument because it frustrates the immediate attainment of whatever objectives a majority of the people may desire at any given time 72

C. This Court's experience with erecting economic philosophies into constitutional absolutes under the Due Process Clause stands as a solemn warning against now erecting political philosophies into similar constitutional absolutes under the Equal Protection Clause 78

III. The apportionment of the Delaware General Assembly effected by the 1963 amendment to the Delaware constitution is entirely consistent with well-settled interpretations of the Equal Protection Clause 88

A. The Equal Protection Clause does not strike down classifications that have a reasonable basis even though a court as an original proposition might be able to devise other classifications that may seem more logical or symmetrical 88

B. The 1963 amendment to the Delaware Constitution reapportioning the Delaware House of Representatives has a reasonable basis, reflects a good faith effort to comply with *Baker* v. *Carr*, provides for periodic reapportionment as the population of the State shifts over the years, and contains an effective enforcement provision 91

Page

C. Similarly, the 1963 amendment to the Delaware Constitution reapportioning the Delaware Senate complies with the Equal Protection Clause 95

IV. The district court's refusal to give the Delaware General Assembly sufficient time to reapportion the State, and its issuance of an injunction that prevented amendment of the Delaware Constitution according to the terms of that instrument, constituted fundamental and vitiating error 98

A. The record shows a continuous course of urgency, haste, and pressure on the part of the district court that is wholly at variance with the standards and approaches prescribed by this Court for litigation involving a State of the Union 98

B. The combination of the decree and the injunction below, which effectually prevent any amendment of the Delaware Constitution according to the terms of that instrument, constitutes a gross abuse of judicial power 104

C. The record further shows a consistent compulsion on the part of the district court to effect a reapportionment of the Delaware General Assembly by Federal judicial decree 107

Conclusion 110

Appendix—Excerpts from the debates in the 40th and 41st Congresses on the readmission of the former Confederate States 112

AUTHORITIES

CASES:

Adair v. *United States*, 208 U.S. 161 91
Adkins v. *Children's Hospital*, 261 U.S. 525 ..... 78, 86
Baker v. *Carr*, 369 U.S. 186 ..... 25, 91, 93, 103
Bolling v. *Sharpe*, 347 U.S. 497 76
Dantzler v. *Callison*, 352 U.S. 939 78
Davidson v. *New Orleans*, 96 U.S. 97 81

Page

Douglas v. *Jeannette*, 319 U.S. 157 82
Erie R. Co. v. *Tompkins*, 304 U.S. 64 83
Ferguson v. *Skrupa*, 372 U.S. 726 ..... 23, 24, 79, 86, 87
Girouard v. *United States*, 328 U.S. 61 108
Goesaert v. *Cleary*, 335 U.S. 464 ..... 25, 89
Graves v. *O'Keefe*, 306 U.S. 466 83
Gray v. *Sanders*, 372 U.S. 368 ..... 27, 103
Griffin v. *Illinois*, 351 U.S. 12 ..... 85, 86
Hammer v. *Dagenhart*, 247 U.S. 251 78
Hitchcock v. *Collenberg*, 353 U.S. 919 78
Lochner v. *New York*, 198 U.S. 45 78
MacDougall v. *Green*, 335 U.S. 281 ..... 71, 87
Maryland Committee on Fair Representation v. *Tawes*, No. 29, this Term 12
McGowan v. *Maryland*, 366 U.S. 420 ..... 25, 88
M'Culloch v. *Maryland*, 4 Wheat. 316 76
Morehead v. *Tipaldo*, 298 U.S. 587 81
Morey v. *Doud*, 354 U.S. 457 ..... 25, 89
Muller v. *Oregon*, 208 U.S. 412 78
New Jersey v. *Delaware*, 291 U.S. 361 ..... 34, 37, 39
New Jersey v. *Delaware*, 295 U.S. 694 37
Opinion of the Justices, 190 A. 2d 519 (Del.) 8, 50, 90,
Opinion of the Justices, Del. Sup. Ct., May 6, 1963, Del. App. 1a 18, 106
Oyama v. *California*, 332 U.S. 633 ..... 85, 86
Pen v. *Lord Baltimore*, Ridg. t. H. 333 41
Penn v. *Lord Baltimore*, 1 Ves. Sen. 444 41
Sanitary District v. *United States*, 266 U.S. 405 88
Skinner v. *Oklahoma*, 316 U.S. 535 ..... 84, 86
Small v. *United States*, 219 F. Supp. 659 35
Southern Pac. Co. v. *Jensen*, 244 U.S. 205 82
Takahashi v. *Fish and Game Commission*, 334 U.S. 410 ..... 85, 86
Truax v. *Corrigan*, 257 U.S. 312 ..... 70, 86
Ullmann v. *United States*, 350 U.S. 422 84
United States v. *Carolene Products Co.*, 304 U.S. 144 84
United States v. *Darby*, 312 U.S. 100 78
United States v. *Florida*, 363 U.S. 121 ..... 22, 31, 55, 62, 63, 67, 71, 114
Virginia v. *West Virginia*, 220 U.S. 1 101
Virginia v. *West Virginia*, 222 U.S. 17 101
Virginia v. *West Virginia*, 238 U.S. 202 101-102

Page

Virginia v. *West Virginia*, 241 U.S. 531 ..... 101, 102
Virginia v. *West Virginia*, 246 U.S. 565 ..... 28, 109
Watson v. *City of Memphis*, 373 U.S. 526 103
West Coast Hotel Co. v. *Parrish*, 300 U.S. 379 78
Williamson v. *Lee Optical Co.*, 348 U.S. 483 78
Yick Wo v. *Hopkins*, 118 U.S. 356 ..... 85, 86

CONSTITUTIONAL PROVISIONS:

(1) *Constitution and Other Organic Laws of the United States:*

Articles of Confederation 20, 48, 52
Art. I 49

Constitution of the United States:

Art. II, Sec. 3 74

Art. V 23, 74, 83

Fourteenth Amendment 4, 17, 21-23, 30, 31, 56, 70, 71, 81, 82, 95

Section 1:

Due Process Clause 24, 78, 81, 87

Equal Protection Clause 17, 22-26, 30, 31, 52-56, 67, 70, 71, 78, 81-82, 84-88, 94, 95, 98, 104

Section 5 ..... 55, 67, 95

Fifteenth Amendment 22

Seventeenth Amendment 74

(2) *Constitutions and Other Organic Laws of Delaware:*

Penn's Act of Union, 1682 (1 *Laws of Delaware* [1797] App. 8) 34

Penn's Charter of Liberties, 1701 (1 *id.* App. 31) 35, 48

Delaware Declaration of Rights, 1776 46

Delaware Constitution, 1776: Page
Art. 1 ..... 15, 20, 47
Arts. 3-4 15
Art. 7 49
Delaware Constitution, 1792:
Art. II, §§ 2, 3 15
Delaware Constitution, 1831:
Art. II, §§ 2, 3 15
Delaware Constitution, 1897:
Art. II, § 2 ..... 5, 50, 90, 105
Art. XVI
§ 1 ..... 8, 93, 99, 104
§ 2 ..... 104, 105
Amendment of 1963 ..... 17, 25, 28, 50, 90-95, 98, 105, 107
Sections 2-4 95
Section 2A 92, 105
Section 2B 105
(3) *Constitutions of other States:*
Ala. Const. 1867, Art. VIII, §§ 1, 3 57
Ark. Const. 1868, Art. V, § 8 57
Fla. Const. 1868, Art. XIV, ¶2 ..... 57, 59
Ga. Const. 1868, Art. III, § 2 ..... 58, 61
La. Const. 1868, Tit. II, § 22 ..... 57, 60
Miss. Const. 1868, Art. IV, §§ 34, 35 57
N.C. Const. 1868, Art. II, §§ 5, 6 57
S.C. Const. 1868, Art. II, § 8 ..... 58, 62
Tex. Const. 1868:
Art. III, §§ 39, 40 63
Art. IV, § 11 ..... 57, 63
Va. Const. 1870, Art. V, § 3 ..... 58, 61

STATUTES: Page

(1) *Statutes of the United States:*

Sec. 4 of the Act of Aug. 14, 1848, c. 177, 9 Stat. 323 69
Sec. 4 of the Act of Mar. 3, 1849, c. 121, 9 Stat. 403 69
Sec. 4 of the Act of Sept. 9, 1850, c. 49, 9 Stat. 446 68
Sec. 4 of the Act of Sept. 9, 1850, c. 51, 9 Stat. 453 69
Sec. 4 of the Act of Mar. 2, 1853, c. 90, 10 Stat. 172, 173 69
Act of May 30, 1854, c. 59, 10 Stat. 277:
Sec. 4 69
Sec. 22 69
Sec. 4 of the Act of Feb. 28, 1861, c. 59, 12 Stat. 172 68
Sec. 4 of the Act of Mar. 2, 1861, c. 83, 12 Stat. 209 68
Sec. 4 of the Act of Mar. 2, 1861, c. 86, 12 Stat. 239 68
Act of Feb. 24, 1863, c. 56, 12 Stat. 664 68
Sec. 4 of the Act of Mar. 3, 1863, c. 117, 12 Stat. 808 68
Sec. 4 of the Act of May 26, 1864, c. 95, 13 Stat. 85 68
Act of June 20, 1864, c. 141, 13 Stat. 142 69
Act of March 2, 1867, c. 153, 14 Stat. 428 56
Sec. 5 56
Act of March 23, 1867, c. 6, 15 Stat. 2 56
Act of July 19, 1867, c. 30, 15 Stat. 14 56
Act of June 22, 1868, c. 69, 15 Stat. 72 .....57, 114
Act of June 25, 1868, c. 70, 15 Stat. 73 ...57, 60, 112, 122
Sec. 1 .....64, 116
Sec. 4 of the Act of July 25, 1868, c. 235, 15 Stat. 178 68
Act of April 10, 1869, c. 17, 16 Stat. 40 .....61, 63
Act of Dec. 22, 1869, c. 3, 16 Stat. 59 129
Sec. 8 64

Page

Act of Jan. 26, 1870, c. 10, 16 Stat. 62 ..... 57, 61, 64
Act of Feb. 23, 1870, c. 19, 16 Stat. 67 ..... 57, 65
Act of Mar. 30, 1870, c. 39, 16 Stat. 80 ..... 57, 63, 65
Act of July 15, 1870, c. 299, 16 Stat. 363 ..... 57, 67, 132
Act of Feb. 21, 1871, c. 64, 16 Stat. 429 69
Act of Feb. 21, 1871, c. 65, 14 Stat. 429 69
Jt. Res. of June 16, 1866, No. 48, 14 Stat. 358 55
Jt. Res. of July 24, 1866, No. 73, 14 Stat. 364 56
Reconstruction Acts of 1867 21

(2) *Delaware Statutes:*

Act of 1700, 1 Laws of Del. 51 ..... 35, 36
Act of 1704, 1 Laws of Del. 55 36
Act of Nov. 4, 1742, 1 Laws of Del. App. 62 36
Act of 25 Geo. II (1751), 1 Laws of Del. 299 37
Act of Oct. 28, 1775, 1 Laws of Del. 587 36
Laws of the Government of New-Castle, Kent and Sussex, upon Delaware:
1741 compilation 37
1752 compilation 37
1763 compilation 37
Vol. 54, Laws of Del., Chapter 90 108

(3) *Statutes of Other States:*

Ga. Acts 1861, Act 97, p. 101 62
Ga. Laws 1862-63, No. 188, Sec. II, pp. 206-207 62
Ga. Laws 1864-65, No. 80, p. 81 62
Ga. Laws 1865-66, No. 67, p. 49 62
Ga. Laws 1865-66, No. 68, p. 49 62
Va. Acts 1861, c. 23, p. 45 61
W. Va. Acts 1919 (Ex. Sess.), c. 10 109

LEGISLATIVE MATERIALS: Page

Congressional Globe, 40th Cong., 2d sess.:

[These debates are indexed by subject rather than by page]

Alabama and 5 other States, bill to readmit 112

Arkansas, bill to readmit 114

Florida, seating of Senators and Representatives 60

Louisiana, seating of Senators and Representatives 61

South Carolina, seating of Senators and Representatives 63

Congressional Globe, 41st Cong., 1st & 2d sess.:
Georgia, bill for the reconstruction of 122

Congressional Globe, 41st Cong., 2d sess.:
Georgia, bill to readmit 130

Delaware Legislative Materials:

House Bill 574, 121st Gen. Assembly 8, 10, 99

House Bill 3, 122nd Gen. Assembly 8

House Bill 373, 122nd Gen. Assembly 108

Senate Bill 195, 122nd Gen. Assembly 108

H.R. 1058, 40th Cong., 2d sess. 112

H.R. 259, 41st Cong., 1st sess. 122, 125

H.R. 1335, 41st Cong., 2d sess. 130

H.R. Ex. Doc. 281, 40th Cong., 2d sess. 64

H.R. Ex. Doc. 291, 40th Cong., 2d sess. 62, 64

H.R. Misc. Doc. 81, 41st Cong., 2d sess. 64

H.R. Misc. Doc. 109, 40th Cong., 2d sess. 63

Journals of the Continental Congress:

Vols. 1-5, various references to the Lower Counties 41-42

4 J. Cont. Cong. 342 43

4 J. Cont. Cong. 357, 358 43

6 J. Cont. Cong. 1000 47

Page

S. 281, 41st Cong., 2d sess. 125

Sen. Ex. Doc. 54, 40th Cong., 2d sess. 64

Sen. Ex. Doc. 57, 40th Cong., 2d sess. 64

HISTORICAL MATERIALS:

Diary and Autobiography of John Adams (Butterfield ed. 1961):

Vol. 2, numerous references to Lower Counties.. 42

Vol. 3, pp. 383, 386 43

1 Burnett, *Letters of Members of the Continental Congress*, 192, 490-491 42

Cochran and Andrews, eds., *Concise Dictionary of American History* (1962), *s.v.* Delaware 49

Debates and Proceedings of the Constitutional Convention of the State of Delaware (1853):

Pp. 302-313 15-16

Debates and Proceedings of the Constitutional Convention of the State of Delaware, 1896-1897 53

De Valinger, ed., *Court Records of Kent County, Delaware, 1680-1705*, 340 35

De Valinger, *The Development of Local Government in Delaware, 1638-1682* 34

Duke of York's deeds of feoffment to William Penn (1 Laws of Del. [1797] App. 1, 4) 34

Farrand, *The Delaware Bill of Rights of 1776*, 3 Am. Hist. Rev. 641 46

Farrand, *The Framing of the Constitution* (1913) c. VII 74

Force, *American Archives, 4th series*, vol. 6, pp. 883-884 44

1 *The Papers of Thomas Jefferson* (Boyd ed.) 182, 310, 311, 314 42

Page

Konkle, *Delaware: A Grant Yet Not a Grant*, 54 Pa. Mag. of Hist. & Biog. 241 39

Minutes of House of Assembly of the Government of the Counties of New Castle, Kent and Sussex upon Delaware * * * *1739* 40, 42

Minutes of House of Representatives of the Government of the Counties of New Castle, Kent and Sussex upon Delaware * * * *1765-1770* 40, 42

J. A. Munroe, *Federalist Delaware, 1775-1815:*

P. 15 .....44, 45

P. 83 45

P. 84 50

Opinion of Atty. Gen. Sir Wm. Murray, Sept. 1, 1745 38

5 *Pennsylvania Archives, second series*, 631 34

87 Pa. Mag. of Hist. & Biog. 290 41

Proceedings of the Convention of the Delaware State * * * *1776;* numerous references 45, 46

Randall and Donald, *The Civil War and Reconstruction* (2d ed. 1961); numerous references ...61, 63, 65-66

Records of the Court of New Castle on Delaware, 1676-1681, 6, 385 34

H. C. Reed, *The Delaware Constitution of 1776;* numerous references 46, 49

Rodney, *Early Relations of Delaware and Pennsylvania*, 54 Pa. Mag. of Hist. & Biog. 209 .....35, 40

Ryden, ed., *Letters to and from Caesar Rodney, 1756-1784:*

P. 79 44

P. 81 45

P. 94 45

C. Warren, *The Making of the Constitution* (1937 ed.) pt. Two, c. V 74

MISCELLANEOUS:

Page

3 Bl. Comm. *283-284 109

4 *id.* *318-320 109

1 *Catalogue of the Library of the Law School of Harvard Univ.* 540 37

Coleman, *The State as Defendant under the Federal Constitution*, 31 Harv. L. Rev. 210 109

Fischer, *Enforcement of a Money Judgment against a State*, 12 St. Louis L. Rev. 57 109

Good, *Judicial Determination of Interstate Disputes*, 26 Neb. L. Rev. 1 109

Holmes, *Collected Legal Papers* (1921) 291, 292-293 77

S.E. Morison, *Harrison Gray Otis* 98

Note, *The Virginia-West Virginia Debt Controversy*, 31 Harv. L. Rev. 1158 109

One Man—One Vote, 9 ..... 33, 49

Population of the United States in 1860; compiled from the Original Returns of the Eighth Census .. 58

Powell, *Coercing a State to Pay a Judgment*, 17 Mich. L. Rev. 1 109

Proclamation No. 11, July 20, 1868, 15 Stat. 706 .... 56, 57

Proclamation No. 13, July 28, 1868, 15 Stat. 708 ... 56, 57

Proclamation of the Governor of Delaware, May 17, 1963, Del. App. 5a 18, 106

Revised Rules of the Supreme Court of the United States:

Rule 15(3) 3

Rule 46 19

The Sunday Star, Oct. 20, 1963, p. C-2 91

Thayer, *Legal Essays*, 159 94

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 307

MABEL V. ROMAN, Clerk of the Peace for New Castle County; WALTER A. HANDSBERRY, Clerk of the Peace for Kent County; I. ROBERT WILLEY, Clerk of the Peace for Sussex County; *et als., Appellants,*

v.

RICHARD SINCOCK, *et als.*

On Appeal from the United States District Court for the District of Delaware

BRIEF FOR THE APPELLANTS

OPINIONS BELOW

The opinion of the district court granting a limited stay (J.S. App. A1-A6)[1] is reported at 207 F. Supp. 205. The

[1] In view of the order of the Court directing that the parties proceed on the unprinted record, we use the following designations:

"J.S. App." refers to the Appendices to the Jurisdictional Statement.

"Del. App." refers to the record appendix printed by the appellants.

"PTO" refers to the Pretrial Order in this case.

"Tr." refers to the typewritten transcript of evidence at the trial.

"M/A" refers to Brief of Appellees in Support of their Motion to Affirm the Decision of the District Court.

opinion of the district court denying appellees' motion for a preliminary injunction and denying appellants' motion for a further stay (J.S. App. A8-A16) is reported at 210 F. Supp. 396. The opinion of the district court holding unconstitutional under the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States the apportionment provisions of the Delaware Constitution of 1897 as well as the apportionment amendment to the Delaware Constitution adopted in 1963, together with the concurring and dissenting opinions delivered there (J.S. App. A16-A67), are reported at 215 F. Supp. 169.

The opinion of the Supreme Court of Delaware holding that the 1963 amendment became effective on January 17, 1963, is reported *sub nom. Opinion of the Justices*, 190 A. 2d 519. The opinion of the Supreme Court of Delaware holding that the Governor of Delaware must obey the mandate of the 1963 amendment notwithstanding the decision below in this case (Del. App. 1a-5a) has not yet been reported.

JURISDICTION

(a) The final decree of the district court (J.S. App. A68), declaring unconstitutional under the Fourteenth Amendment both the apportionment provisions of the Delaware Constitution of 1897 and of the 1963 amendment to that Constitution, was entered on April 30, 1963. The notice of appeal from the final decree was filed in the district court on May 28, 1963.

(b) The injunction of the district court (J.S. App. A69-A70), enjoining the holding of any elections for members of the Delaware General Assembly under both of the foregoing provisions of the Delaware Constitution, was entered on May 20, 1963, on the district court's own motion, without notice or hearing. A motion to stay that injunction pending appeal was denied by the district court on June 10, 1963. The notice of appeal from the injunction and from

denial of the motion to stay was filed in the district court on June 12, 1963.

(c) On June 27, 1963, Mr. Justice Brennan stayed the foregoing injunction "pending the perfection of the appeals and the final disposition of such appeals by this Court."

(d) Pursuant to this Court's Rule 15(3), both appeals were treated as a single case, which was filed here on July 25, 1963. Probable jurisdiction was noted on October 21, 1963, in an order directing that the printing of the record be dispensed with.

(e) The jurisdiction of this Court rests on 28 U.S.C. §§ 1253 and 2101(b).

QUESTIONS PRESENTED

1. Does the Fourteenth Amendment to the Constitution of the United States preclude the State of Delaware from employing the Federal system of a House of Representatives based on population and a Senate based on equal representation for each county in constituting the General Assembly of the State?

2. Did the court below err in entering a blanket injunction restraining the holding of any election pertaining to the members of the General Assembly under the apportionment provisions of the Delaware Constitution, both before and after the 1963 amendment thereto, on the ground that such constitutional provisions, which provided among other things for area representation in the Delaware Senate, and that did not conform to the apportionment guidelines for the Delaware House of Representatives formulated by the court below, were in consequence of both reasons violative of the Fourteenth Amendment to the Constitution of the United States?

3. Does the apportionment of the membership of the Delaware House of Representatives effected by the 1963

amendment to the Delaware Constitution violate the Fourteenth Amendment to the Constitution of the United States?

4. Does the apportionment of the membership of the Delaware Senate effected by the 1963 amendment to the Delaware Constitution violate the Fourteenth Amendment to the Constitution of the United States?

5. Does the Fourteenth Amendment to the Constitution of the United States require the General Assembly of the State of Delaware to be reapportioned according to the precepts, standards, principles and guidelines set forth and discussed in the opinion of the court below dated April 17, 1963?

CONSTITUTIONAL PROVISIONS INVOLVED

The provisions of the Constitution of the United States and of the Constitution of Delaware involved in this case are set forth at J.S. App. A71-A81.

STATEMENT

This was an action by one, Sincock, and six other individuals, now appellees here (and most generally referred to below simply as Sincock *et als.*), that sought to restrain the enforcement of the apportionment provisions of the Delaware Constitution of 1897 then in force, and asked in addition that the United States District Court for the District of Delaware reapportion the legislature of that State, brought against virtually every official of Delaware charged with responsibility for elections therein, including the Chancellor and the Judges of the Superior Court (who took no position on the merits of the case). While the action was pending, and under its impetus, two successive General Assemblies concurred in amending the State Constitution to effect a reapportionment.

Thereafter, the court below held unconstitutional under the Fourteenth Amendment both the apportionment pro-

vision of the 1897 Delaware Constitution as well as the amendment thereto effected in 1963; entered a decree to that effect; and later enjoined the holding of all elections to the General Assembly of Delaware under either constitutional provision. This injunction was thereafter stayed by the Circuit Justice; as will be pointed out below, pp. 104-105, the injunction and the decree together effectively preclude any amendment of the Delaware Constituton under either of the means prescribed by that instrument.

A. Delaware Apportionment When Suit Was Brought

Article II, Section 2, of the Delaware Constitution of 1897 (J.S. App. A71-A75), in force when the present action was commenced, divided the State into 17 Senatorial and 35 Representative Districts. Seven Senatorial Districts and ten Representative Districts each were assigned to Sussex County, to Kent County, and to rural New Castle County—"rural" in this connection means that portion of the latter county which excludes the City of Wilmington—while Wilmington was assigned two Senatorial and five Representative Districts (PTO, ¶¶C4-5). The debates in the 1897 Constitutional Convention show that this plan represented a compromise (PTO, ¶C10).

In 1897, the population of Delaware was about 180,000, of which Sussex County had 38,000, Kent County 32,000, and New Castle County 105,000 (of whom 70,000 were in Wilmington and 35,000 in rural New Castle County) (PTO, ¶C9).

By 1960, the population of Delaware had risen to 446,292, divided as follows: Sussex County, 73,195; Kent County, 65,651; New Castle County, 307,446 (Wilmington, 95,827; rural New Castle County, 211,619) (PTO, ¶C13). By 1960, also, the population of the several Representative Districts varied from a low of 1,643 to a high of 58,228, while the Senatorial Districts ranged from 4,177 to 64,820 (PTO, ¶¶C14-17; J.S. App. A22-A27).

B. Initial Steps in Present Action; Delaware Constitution Amended

The present action was brought on June 5, 1962 (J.S. App. A14). It sought a declaration that the apportionment provisions of the Delaware Constitution of 1897 were unconstitutional; an injunction against the holding of any elections to the General Assembly; an order reapportioning the Representative and Senatorial Districts of Delaware according to population; or, alternatively, an order directing that the 1962 elections to the General Assembly be on an at-large basis.

On July 25, 1962, the court below stayed the proceedings until August 7. In its opinion (J.S. App. A4-A5), rendered before any evidence was heard, the district court emphasized the need for haste, saying:

> "It is not necessary to state here fully the exigencies presented by the election laws of Delaware, constitutional provisions aside. The primary election this year must be held on the third Saturday in August; viz., on Saturday, August 18, 1962. It is necessary for the duly authorized officers of the political parties to notify the Department of Elections of the need for a primary election by the first Saturday in August; i.e., by Saturday, August 4, 1962. Publication of the time and places for holding primary elections must be made at least five days prior to the time the primary election is to be held; i.e., probably as a practical matter by Saturday, August 11, 1962. If the Constitution is to be amended publication of the proposed amendment must be made by August 6, 1962. The sum of the foregoing is that definite and positive action should be taken by the present General Assembly prior to August 4, 1962, and must be taken by the present General Assembly no later than August 5, 1962, or nothing constructive can be accomplished, at least through the means of the legislative branch of our State Government without months if not years of futile delay; in all probability not until after the general election of 1966.

> "We point out what we are sure will be obvious to the electors of this State that insofar as members of the General Assembly are concerned, if there is no valid primary election there can be no valid general election. Without a valid election law there can be no *de jure* elections either primary or general, insofar as membership in the General Assembly is concerned. Finally, and perhaps at the risk of needless repetition, we reiterate that if the apportionment provisions of Section 2 of Article 2 are held invalid, we can perceive difficulty in convening a *de jure* legislature. Without a *de jure* General Assembly it is difficult to perceive how valid legislative acts can be enacted. The unpleasant results would be far reaching."

The court below also suggested that the Delaware General Assembly amend the State Constitution so that apportionment would thereafter be regulated by statute rather than by constitutional provision, saying (J.S. App. A4):

> "Such an Amendment and such an Act would not only preserve the legislative system of Delaware and the rights of its electors while a permanent effective constitutional provision relating to apportionment could be worked out, but would also afford the State through its elected representatives the opportunity to pass a new apportionment act without undue delay in the event this or another court should declare the initial legislative apportionment statute enacted under such proposal not to be in conformity with the equal protection clause of the 14th Amendment.
>
> "Whether or not such a plan as outlined above is feasible and merits either consideration or adoption is exclusively within the province of the General Assembly."

Meanwhile, the Governor of Delaware had appointed a Bipartisan Reapportionment Committee (Del. App. 52a), around July 5, 1962 (Del. App. 92a-93a), which held a series of meetings from July 12 to 23, at the end of which time it presented its report (Del. App. 54a-58a, 63a-65a). See Del. App. 66a-68a, 73a-77a, 83a-88a, 90a-91a, for reasons

underlying its recommendations, and Def. Ex. 1 (Del. App. 100a-339a) for a record of its hearings. The chairman of that Committee testified (Del. App. 88a):

> "We felt this Court had a gun at the back of the General Assembly of Delaware, and we had better apportion the House of Representatives on a population basis under Baker versus Carr, and as fast as we could."

The portion of the Committee's report that dealt with an immediate plan of reapportionment became House Bill 574 to amend the State Constitution (Del. App. 93a-94a) and was duly passed (Del. App. 94a-95a), while another portion, which proposed to speed up the Constitutional provisions for the calling of a Constitutional Convention, failed to muster the required two-thirds majority (Del. App. 94a-95a). House Bill 574 contained a provision, inserted by way of compromise, which left unchanged the representation formula prescribed by the existing Constitution for the composition of a Constitutional Convention (Del. App. 95a, 96a-97a; see Sec. 2B, J.S. App. A81).

Thereafter, in conformity with the provisions of Art. XVI, Sec. 1, of the Delaware Constitution (J.S. App. A76), the next General Assembly sitting after a general election had intervened again passed the reapportionment measure as House Bill 3, which became effective on January 17, 1963 (*Opinion of the Justices*, 190 A.2d 519). It is set out at J.S. App. A77-A81.

Briefly, the 1963 reapportionment adds one representative to each of two Representative Districts in Wilmington, one representative to one such District in rural New Castle County, two representatives to two such Districts, and three representatives to another. It made no changes in either Kent or Sussex Counties, so that the net result was to add 10 representatives from New Castle County to the lower house (PTO, ¶¶C21-22).

In the Senate, the amendment results in following the Federal pattern more closely, by giving each County seven

senators; the additional members for Kent and Sussex are to be elected at large after dividing each county so that their eastern and western portions each elect one additional senator (PTO, ¶¶C23, 26).

The effect of the amendment on the population of the several Representative and Senatorial Districts is set out at J.S. App. A31-A35.

The reasons underlying the 1963 reapportionment appear in the record as follows:

On the suggestion of a Wilmington member, the Committee decided to follow the Federal analogy (Del. App. 85a).

Accordingly, it was decided to retain a bicameral legislature with the Senate on a county basis, while Kent and Sussex were divided on an east-west basis to obtain two more floterial Senators from each without disturbing historical and traditional Senatorial Districts (Del. App. 83a, 85a-86a).

The House was reapportioned on a population basis (Del. App. 83a), with each existing Representative District retaining one representative, and with a reapportionment every 10 years (Del. App. 67a-68a). After considering various figures (Del. App. 67a-75a, 84a-85a), the Committee decided on 15,000 or a major fraction thereof as the limit of each Representative District, based on trends in population growth, the small size of the State, accommodations for the General Assembly, and in order to give a voice to all segments of society and to all practices and customs (Del. App. 73a-76a). In leaving at least one Representative to each existing Representative District, the Committee proceeded on the basis that, considering population trends, all Districts would soon grow to reach a major fraction of 15,000 (Del. App. 75a, 91a-92a).

C. Further Motions; Trial

The defendant election officials' motions to dismiss were denied while the 121st General Assembly was in session, the court saying, among other things (J.S. App. A8):

> "We wish to make it plain that we have no desire to substitute our judgment for the collective wisdom of the General Assembly of Delaware whose primary duty it is to assure the electors of this State apportionment provisions to meet the test laid down by the Supreme Court of the United States in Baker v. Carr, but in the light of all the circumstances we have no alternative but to proceed promptly."

Thereafter, following the passage on July 30, 1962, by the 121st General Assembly of House Bill 574, all the election officials on August 7 moved for a further stay to enable the 122nd General Assembly, coming into office on January 8, 1963, to be given the opportunity to concur therein and to make it effective as an amendment to the State Constitution.

Sincock *et als.* countered by asking a preliminary injunction to restrain the general election scheduled for November 1962, and by amending the prayers of their complaint to ask that the court declare the then proposed reapportionment amendment to the Delaware Constitution invalid on the same grounds as the original provision that it superseded.

Their amended complaint further prayed that the court provisionally reapportion the General Assembly of the State of Delaware.

The district court denied the motion for the preliminary injunction and likewise denied the motion for a stay (J.S. App. A8-A16), saying at A15-A16:

> "We regret that the 121st General Assembly did not see fit to adopt the suggestion 'as a temporary haven,

and not as an ultimate harbor'* made by us, that the embodiment of apportionment provisions be striken out of the Constitution of Delaware by an amendment to Section 2 of Article II that would prescribe that the composition of the Senate and the House of Representatives of the General Assembly and the terms of office of its members in the future should be as provided by Act of the General Assembly; i. e., provided by statute and not by constitutional provisions. Had the General Assembly pursued the course suggested and proposed such an amendment the 122nd General Assembly would have been able to adopt it. If an apportionment statute, not meeting the standards of the Fourteenth Amendment, had then been enacted by the General Assembly, no further amendment to the Constitution of Delaware would have become necessary. Another statute satisfying the guarantees of the Fourteenth Amendment could simply have been passed. As things stand now, if Section 2 of Article II and the provisions of H.B. 574 be held unconstitutional, no new plan for the composition of the Senate and House of Representatives can be effected under the provisions of Section 1 of Article XVI by a General Assembly until 1965. This in effect leaves this court in a position where it must proceed promptly to adjudicate the merits of the controversy after full hearing."

Thereafter, following the formulation of a lengthy pretrial order, the trial began.

At the trial, Sincock *et als.* called only two witnesses:

One, Dr. Paul Dolan, Professor of Political Science at the University of Delaware (Tr. 29), expressed his belief (Tr. 34) "that the general axiom of one man, one vote should prevail"; that (Tr. 104) population should be the sole factor in any apportionment; that (Tr. 122) a unicameral legislature was best; and that (Tr. 141) Delaware did not need a bicameral legislature.

---

* [Note in original: "See 207 F. Supp. at pp. 206-207."]

The other, Dr. Royce Hanson, Associate Professor of Government and Public Administration at American University (Tr. 147-148), is the President of the appellant Committee in the Maryland reapportionment case here, *Maryland Committee on Fair Representation* v. *Tawes*, No. 29, this Term (Tr. 149-150), in which he seeks judicial approval for some of the views to which he testified, and in which he is intensely interested (Tr. 229-230).

The Delaware election officials called Dr. James K. Pollock, Murfin Professor of Political Science at the University of Michigan (Tr. 328-329), who served as a member of the recent Constitutional Convention in Michigan (Tr. 331-332).

Briefly, Professor Pollock gave more weight to non-population factors in reapportionment, such as sectional interests, social and economic factors, natural resources, tradition, and history, than did the witnesses for Sincock *et als.* (Tr. 333-339, 342, 370-371, 376, 383-384).

In our view, however, exposition in detail of the conflicting views of these three professors of political science would serve no purpose here, not only because one of them is an interested party in a related case, but primarily because those views go simply to the wisdom and desirability of different plans for arranging state legislatures. Moreover, most of what the professors said bears out the presiding judge's comment that "it is ceasing to be testimony and becoming a very interesting lecture in electoral machinery" (Tr. 434). Their aggregate "evidence", including colloquies, extends over nearly three-quarters of the transcript.

During the trial, the several professors were asked to comment on a reapportionment plan for the Delaware House of Representatives devised by the court (Court Ex. 4, Del. App. 98a-99a; Tr. 144-147, 168-169, 171-174, 207, 376-378), a plan which was shown to contain at least one arithmetical error (Tr. 704). The record suggests

that this was originally a confidential document (Tr. 76-77). In fact it was presented to counsel by the presiding judge at the pretrial conference.

During the course of the trial, Sincock *et als.* proposed a reapportionment plan of their own, based solely on population for both houses, which provided for some at-large elections (Pl. Ex. 17-21; Tr. 210-226, 232-234, 296-301, 307-308, 314-316). Thereafter, following a discussion in which plaintiffs called attention to their prayer that the district court reapportion the Delaware legislature (Tr. 303-318), plaintiffs hastily rewrote their plan (Pl. Ex. 24-36; Tr. 664-665, 698, 703), at meetings at which one of the State's major political parties was unrepresented (Tr. 697, 707-709).

Throughout the trial, the presiding judge emphasized that "The terrible problem here is one of time." (Tr. 357), repeating his expression about "a box of time" (Tr. 607, 608-609). Towards the close of the hearings, he indicated that the district court might have to draw up a reapportionment plan of its own (Tr. 737).

D. Counties in Delaware History and Law

Under Point I, pp. 33-53, below, we document extensively the process whereby the Three Lower Counties of New Castle, Kent, and Sussex, upon Delaware, became, in September 1776, The Delaware State.

At this juncture it is sufficient simply to summarize what is shown by the documents and amplified by the testimony (Del. App. 12a-50a) of the State Archivist, Mr. Leon de Valinger, Jr., a recognized authority on Delaware history, and editor, *inter alia*, of the *Court Records of Kent County, Delaware, 1680-1705.*

Two of the counties started as judicial districts created by the Dutch prior to 1673, the third was created by the

Duke of York in 1680. Under Penn, the governmental powers and functions of the three counties were substantially expanded.

Originally, the Three Lower Counties upon Delaware, known also as the Territories, shared representation with the other counties of Pennsylvania, known as the Province, in an Assembly in which each county had equal county representation.

Penn's Charter of Liberties of 1701 permitted within three years "a distinct Assembly for the Territories," and, after 1704, the Delaware counties had a separate Assembly, again with equal county representation, but with the same governor or lieutenant governor as the Province.

In 1745, Lord Mansfield, then Attorney General Sir William Murray, doubted the legal authority of this "distinct Assembly," none of whose laws were ever in fact submitted to the British crown for approval.

Contemporaneous references to the area in question, in the Journals of the Continental Congress and in the letters and papers of its members, as—in variant forms—"the Three Lower Counties *on* (or *upon*) Delaware," but never as counties *of* Delaware, indicate that they were not regarded by contemporaries as forming a unitary body.

In June 1776 the Assembly for the Counties of Newcastle, Kent, and Sussex, upon Delaware, severed all ties with the Crown. At that point sovereignty resided in each of the counties (Del. App. 19a-20a), and there was no executive, save as the Speaker of the Assembly, or the President of the Convention that met in August 1776, may have functioned as such. During this interim period, from June to September 1776, some or all of the three Counties on Delaware could have joined Pennsylvania or Maryland or formed separate States (Tr. 287, quoted below at p. 48, note 8; Del. App. 28a).

Finally, on September 20, 1776, the Convention, in which each County had ten delegates adopted a Constitution whose first article provided that—

> "The government of the counties of New-Castle, Kent and Sussex, upon Delaware, shall hereafter in all public and other writings be called, *The Delaware State.*"

At this point, Delaware for the first time became a formal political unit, and for the first time acquired an authoritatively established name. It is only after this date that the Journals of the Continental Congress refer to "Delaware State."

Through successive Constitutions—1776, 1792, and 1831—the three counties were equally represented in the State legislature, each with three members in the upper house, called first the Council and then the Senate, and each having seven representatives in the lower house, called first the House of Assembly and then the House of Representatives. See Del. Const. 1776, Arts. 3 and 4 (1 Thorpe, *The Federal and State Constitutions* (H. R. Doc. 357, 59th Cong., 2d sess.) 562);[2] Del. Const. 1792, Art. II, §§2, 3 (1 Thorpe 568, 570-571); Del. Const. 1831, Art. II, §§2, 3 (1 Thorpe 582, 584-585).

Not until the Constitutional Convention of 1852 was consideration given to increased representation for the City of Wilmington, and then the draft Constitution so providing was rejected by the people of Delaware. (Del. App. 25a, 39a); for its terms, see *Debates and Proceedings of the Constitutional Convention of the State of Delaware* (Dover,

---

[2] Hereinafter cited simply as "Thorpe". The pagination of the seven volumes of this work is consecutive, but in the interest of convenience, the volume number will be indicated in every instance.

1853) 302-313.[3] It was 1897 before any Delaware Constitution deviated from the pattern of equal legislative representation for each county (*supra*, p. 5). Similarly, it was 1897 before any legislative representatives were elected from districts rather than at large from each county (Del. App. 37a, 50a).[4]

Counties have continued to be strong governmental units since the formation of the State in September 1776 (PTO, ¶¶C46-48). Under the statutes of the State, many of which are very old, Delaware counties exercise many functions; the listing that follows is from the final opinion of the district court (J.S. App. A39):

> "Pursuant to state statutes, the counties, *qua* county, exercise the following legislative functions or rights: (a) to assess and levy, collect and receive taxes, 9 Del. C.Ann. § 8601, et seq; (b) to appropriate and borrow money, 9 Del.C.Ann. §§ 4111, 4131, 4133, 1522, 1561; 1563, 6111, 6131, 6132, 6205; (c) to establish pension plans for employees, 9 Del.C.Ann. § 1701, et seq; (d) to appropriate money for the indigent sick, 9 Del.C.Ann. §§ 1801, 4201, 6205; (e) to appropriate money for welfare purposes, 9 Del.C.Ann. § 1521 and 31 Del.C.Ann. §§ 329 and 513; (f) in New Castle County to designate firemen and policemen, 9 Del.C.Ann. § 1903; (g) to provide an ambulance and rescue service, 9 Del.C.Ann. § 2001; (h) to supervise street and highway lighting if the taxable people within the area petition it, in which event the Levy Court acts as a holding company to make the proper contract, 9 Del.C.Ann. § 2101; (i) general supervision over sidewalks, fire hydrants, water mains, sanitary and drainage sewers, when fifty per

---

[3] Interestingly enough, the member of this Convention who represented Pencader Hundred of New Castle County, Benjamin T. Biggs (see *Debates and Proceedings*, *supra*, at 318), was the grandfather of the judge who presided in the district court in this case.

[4] The President of the 1897 Convention, John Biggs (1 Del. Code Ann. [1953] 350), was the father of the presiding judge in this case.

cent or more of the taxable people in a certain area petition that this be done, 9 Del.C.Ann. § 503; (j) to control garbage refuse collection and disposal thereof, 9 Del.C.Ann. § 2401; (k) as to New Castle County, jurisdiction with respect to planning and zoning, 9 Del.C.Ann. § 2601; (l) certain jurisdictional authority with respect to parks and recreation, 9 Del.C.Ann. §§ 610 and 616; and (m) the Register of Wills, Prothonotary, Sheriff, Coroner and Recorder of Deeds carry out the general state laws under the respective county governments, 9 Del.C.Ann. §9101 et seq., § 9502 et seq., § 9603 et seq..

"In colonial days the Levy Courts had the power to administer alms houses, and were until 1935 overseers of roads. They also had the power to tax but did not make the general laws."

E. Opinion, Decree and Injunction Below

In a lengthy opinion (J.S. App. A16-A62), the district court held unconstitutional under the Fourteenth Amendment both the reapportionment provisions of the Delaware Constitution of 1897 and the reapportionment amendment effected in 1963, on the ground that neither plan had a rational or a reasonable basis. The court held that a variation between districts of 1 to 1½ represented the maximum population variance allowable under the Fourteenth Amendment to the Constitution of the United States, and, further, that the Equal Protection Clause required both houses of a State legislature to be apportioned according to population. Judge Biggs again emphasized the time element (J.S. App. A55): "The State of Delaware, the General Assembly, and this court all seem to be trapped in a kind of box of time. The exigencies of the calendar and the oncoming general election of 1964 confront us."

Judge Layton, while concurring as to the House reapportionment, dissented as to the Senate, holding that area representation in one house is perfectly constitutional. However, he concurred in the result, on the ground that

the 1963 amendment, which reapportioned both branches of the Delaware Legislature, contained no separability clause. J.S. App. A63-A67.

The court accordingly entered a final decree, holding unconstitutional both Delaware Constitutional apportionment provisions (J.S. App. A68).

Following the district court's decision, but before its decree had been entered, the Governor of Delaware requested an opinion from the Supreme Court of the State as to the effect of that decision on his obligation to effect a reapportionment pursuant to the terms of the 1963 amendment. The Supreme Court advised that the district court's decree was subject to appeal, that no injunction had been issued and that the governor was not a party to the cause, and that he was in consequence bound to reapportion, though his proclamation should as a matter of deference to the district court refer to its determination. *Opinion of the Justices*, May 6, 1963 (Del. App. 1a-5a). The Governor accordingly issued his reapportionment proclamation on May 17, duly reciting the district court's action (Del. App. 5a-10a).

The consequence was that the district court, three days later, on May 20, 1963, on its own motion and without any hearing, entered an injunction against the holding of any election whatever to the General Assembly either under the apportionment provision of the Delaware Constitution of 1897 or under the apportionment amendment effective in 1963 (J.S. App. A69-A70). As will be shown below, pp. 104-105, this injunction effectively disables the State of Delaware from amending its Constitution by any of the methods prescribed therein.

A motion to stay that injunction pending appeal was denied by the district court on June 10, 1963, whereupon the Delaware election officials, asserting that the injunction was improvident and that the denial of the motion to stay

constituted an abuse of discretion, applied to the Circuit Justice. On June 27, 1963, Mr. Justice Brennan stayed the injunction "pending the perfection of the appeals and the final disposition of such appeals by this Court."

Notices of appeal from (a) the final decree, and (b) the injunction and the denial of the motion for a stay, were timely filed by all of the defendants except the Chancellor and the Judges. See this Court's Rule 46 (Summons and severance abolished).

The present appeal was docketed here on July 25. When Sincock *et al's.* moved to affirm, the Delaware election officials countered with a motion to advance.

On October 21, the Court noted probable jurisdiction, granted the motion to advance, and set the cause for argument on December 9 under an accelerated briefing schedule that dispensed with the printing of the record.

SUMMARY OF ARGUMENT

I. The assertion that the Federal pattern of area representation in one legislative house is unconstitutional when followed in a State legislature rests on the assumption that although the States created the United States, counties did not create States but were created by them.

That was not the case in Delaware. There the three counties on Delaware, after being deeded to William Penn, were by him united to his Province of Pennsylvania, and thereafter they shared representation in the Assembly of that Province. From 1704, the Three Lower Counties upon Delaware had "a distinct Assembly" in which each county was equally represented. The link of a common Governor or Lieutenant Governor bound them to the Province of Pennsylvania, but they had no council.

No law enacted by the Assembly of the Three Lower Counties was ever submitted to the Privy Council in Eng-

land for approval, and Attorney General Sir William Murray, afterwards Lord Mansfield, doubted in 1745 whether the legislative authority of that Assembly would "bear a strickt Examination."

"The Government of the Three Lower Counties of New-Castle, Kent, and Sussex, upon Delaware," with its seal reading "Counties on Delaware," was generally referred to by contemporaries in the first sessions of the Continental Congress as, in variant form, the Lower Counties *on* or *upon* Delaware. No references to the Counties *of* Delaware have been found.

On June 15, 1776, the Assembly of the Three Lower Counties divorced itself from the Crown, after which a Convention was called, in which each county was equally represented; that body on September 20, 1776, adopted a Constitution which declared that "The government of the counties of New-Castle, Kent and Sussex, upon Delaware, shall hereafter in all public and other writings be called, *The Delaware State.*"

From June 15 until September 20, 1776, such sovereignty as there was resided in the separate counties. There was no executive, save as the Speaker of the Assembly assumed ministerial functions of an executive nature—and even he was virtually superseded after the Convention met. Significantly, the experts for both parties at the trial agreed that, after June 15, 1776, some or all of the Three Lower Counties could have joined Pennsylvania, or Maryland, or formed separate States.

At that point, the Three Lower Counties were a loose confederacy of independent counties, just as the United States under the Articles of Confederation was a loose confederacy of sovereign States. But although the United States of America under the Articles of Confederation had an instrument of government and were a political unit, the Three Lower Counties had no charter, had only a doubtful

legislative authority (*vide* Lord Mansfield), and were not a formal political unit until they themselves created "The Delaware State."

Consequently the stock argument against modeling a State legislature on the Federal analogy fails utterly when sought to be applied to Delaware, where indeed the Federal pattern was anticipated. The result is that Delaware has perhaps the strongest claim of any State to erect its legislature on the Federal model.

The district court here did not contest the historical facts summarized above; it simply brushed aside any and all Delaware history that was inconsistent with its own blueprint for Delaware's future.

II.A. After the Reconstruction Acts of 1867 took effect, and every former Confederate State other than Tennessee was placed under military rule, the condition imposed by Congress for the readmission of those States was that each ratify the Fourteenth Amendment, which was then pending, and that each adopt a constitution consistent with the principles and conditions of that Amendment.

Five of those new constitutions provided for the apportionment of both legislative houses on the basis of population, though in one instance, Texas, the population discrepancies between senatorial districts thereunder were as high as 2.19 to 1.

In Florida, whose constitution did not specifically require both houses to be apportioned according to population, there was in fact room for large discrepancies. In Louisiana and Virginia, whose constitutions similarly contained no such specific requirement, the population discrepancies between senatorial districts were, respectively, 2.82 to 1 and 2.26 to 1.

Georgia's new constitution allotted one senator to each of three contiguous counties; this resulted in a maximum

disparity between senatorial districts of 5.7 to 1. Similarly, under South Carolina's new constitution, each county was given one senator, except Charleston County, which received two. Even so, the population discrepancies came to 5.2 to 1.

All of these new constitutions were laid before Congress, and were there examined and debated in detail. Georgia was denied readmission until she first excised two subdivisions from her constitution and, later, until she ratified the Fifteenth Amendment as well. Additional conditions were imposed on Virginia, Mississippi and Texas. While the four States last named were not readmitted until 1870, their legislative reapportionment provisions were in no sense responsible for the delay. The debates show meticulous scrutiny of the new constitutions, see *United States* v. *Florida*, 363 U.S. 121, but reveal not even the slightest intimation or at any time that any former Confederate State that set up its legislature on the Federal pattern was thereby denying to any person within its borders the equal protection of the laws.

This omission is the more striking because, when organizing new Territories, Congress in an unbroken pattern, from (at least) 1849 through 1868 invariably provided for bicameral legislatures, both houses of which were required to be apportioned according to population. Moreover, from 1864 to 1871, Congress was astute to provide for prompt reapportionment in the Territories and to disapprove and repeal any territorial act that appeared to effect an unfair reapportionment.

From this it follows that the Congresses nearest in time to the adoption, ratification, and initial enforcement of the Fourteenth Amendment interpreted the Equal Protection Clause as not prohibiting a State from constructing its legislature on the Federal pattern, and that the contrary

view of the court below, which is supported here by the United States as *amicus curiae*, represents a revelation never vouchsafed to the contemporaries of the framing and the initial implementation of the Fourteenth Amendment.

B. The circumstance that a minority of voters in Delaware can elect a majority of its senate no more condemns the State constitution so providing than the circumstance that 16.31% of the population of the United States can elect a majority of the United States Senate condemns the Constitution of the United States—whose Article V guarantees that this condition shall continue. Thus acceptance of the view of the court below, that Delaware violated the Equal Protection Clause when it followed the Federal model for its senate, involves the unacceptable paradox that the Constitution of the United States carries within itself the forever imbedded cancer of unconstitutional discrimination against the people of the more populous States.

The United States Constitution was fashioned on the view that a system of checks and balances, with its familiar examples of thwarting unrestrained majority rule, furnishes the wisest form of government. After all, a pure example of unchecked majority rule is a lynching. The Framers proceeded on the premise that protection of minority rights and enforcement of civilized processes of law are possible only if effective brakes are imposed on majority impulses.

Paradoxically enough, Sincock *et als.* here invoke the checks-and-balance machinery of judicial review in their effort to remove checks and balances from the governmental structure of the State of Delaware.

C. Any question whether the principle of unrestrained majority rule is better or wiser than a system of checks and balances is inappropriate for judicial resolution on the footing of writing absolutes into broad constitutional provisions. Only this year, *Ferguson* v. *Skrupa*, 372 U.S.

726, stressed the basic fallacy underlying the decisions of another age that erected judgments regarding social and economic desirability into immutable constitutional principles.

There is no present danger of a reversion to those earlier standards under the Due Process Clause. But there is grave danger in the position of those who now urge the Court to write their political theories into the Equal Protection Clause, particularly on the present footing of making a drastic break, without intervening experience or interpretation, in the meaning of that Clause as revealed by its contemporary Congressional interpretation and enforcement. Even the least defensible and most extreme Due Process decisions were, after all, the product of a scalpel, not of a meat-axe. But Sincock *et als.* here ask the Court to amend the Equal Protection Clause by fiat, to make it mean precisely the opposite of what the Reconstruction Congresses by legislation showed it to mean.

Their argument that "the debasement of the Civil Rights of the plaintiffs" is involved will not survive analysis. First, no provision of the Constitution today enjoys preference over any other. Second, vital though the right to vote admittedly is, Sincock *et als.* have never been denied the right to vote. Third, a State of the Union has a large and mighty interest in how its own government shall be constituted and constructed, and this interest cannot properly be minimized by attaching the labels of "liberties" and "rights" to the contentions of individuals in that State who prefer another kind of organic structure.

This Court's experience with doctrinaire interpretations of the Due Process Clause, see *Ferguson* v. *Skrupa*, 372 U.S. 726, stands as a solemn warning against similarly doctrinaire interpretations of the Equal Protection Clause.

III. A. The Equal Protection Clause does not strike down classifications that have a reasonable basis, even though a court as an original proposition might be able to

devise other classifications that may seem more logical or symmetrical. See, for recent expositions of this principle, *McGowan* v. *Maryland*, 366 U.S. 423; *Morey* v. *Doud*, 354 U.S. 457; *Goesaert* v. *Cleary*, 335 U.S. 464.

The apportionment of the Delaware General Assembly effected by the 1963 amendment to that State's constitution has a perfectly rational basis, is patterned on institutions that are the very warp and woof of American life, and reflects the fact that, just as the United States was formed by a union of States, so Delaware was formed by a union of Counties.

The disproportion between New York and Alaska in the Senate of the United States on the basis of the 1960 census, 74 to 1, is infinitely greater than those between New Castle and Kent and Sussex Counties in Delaware, which were then, respectively, 4.68 to 1 and 4.2 to 1. The latter disparities are also far less than the 5.7 to 1 in Georgia and the 5.2 to 1 in South Carolina, both of which satisfied the Reconstruction Congress in 1868.

B. The 1963 amendment to the Delaware Constitution reapportioning that State's House of Representatives has a reasonable basis, reflects a good faith effort to comply with *Baker* v. *Carr*, provides for periodic reapportionment as the population of the State shifts over the years, and contains an effective enforcement provision. There is no basis for the holding of the district court that this reapportionment had no rational basis, much less for the court's view that the Equal Protection Clause permits no greater disparity between representative districts than 1½ to 1 and forbids a ratio of as high as 2 to 1. The latter interpretation reflects a limitation that, all too plainly, originated not in the Fourteenth Amendment but only in the preferences and predilections of the district court.

C. The 1963 amendment to the Delaware Constitution that reapportioned that State's Senate is, in its major

feature of equal county representation, fully supported by what has already been said. The plan for the floterial senators from Kent and Sussex counties is amply sustained by the views of Judge Layton, dissenting below. Such imperfections as exist are directly attributable to the very short period of time that the district court allowed the Delaware General Assembly for drafting the amendment. Having been composed under judicial pressure, the resultant plan cannot be attacked as irrational simply because, with less time pressure, it would have been possible to formulate a better one.

The circumstance that the less populous and less prosperous counties (i.e., which pay less in taxes) have the same representation in the Delaware senate as New Castle County, which has more people and pays more taxes, does not condemn the 1963 amendment. The Equal Protection Clause did not resurrect the Federalist Party's philosophy that government should be entrusted only to "the wise, the good, and the rich," nor does it forever subject the few and the poor to the domination of the many and the rich.

IV. A. On any objective reading, the present record reflects a dominant theme of pressure by the district court against a time limit. Each of that court's opinions emphasizes a spirit of haste.

Its first opinion, granting the General Assembly of Delaware only a 13-day stay, contributed directly to the imperfections of the constitutional amendment ultimately adopted. A second stay was denied. As a matter of political stability, apportionment had been a constitutional matter in Delaware since 1776, yet the district court suggested that it should be regulated by statute, and then expressed annoyance that the General Assembly had not adopted its suggestion for such a fundamental departure in State constitutional policy.

The "box of time" of which the presiding judge below so consistently complained was fashioned by the district

court itself; the record amply confirms the view of the chairman of the Governor's Bipartisan Reapportionment Committee that the district court "had a gun at the back of the General Assembly of Delaware."

Very plainly, that court disregarded the principles that should govern litigation involving a State of the Union, which this case does. In the long litigation between Virginia and West Virginia, which concerned only a claim for money due, this Court proceeded deliberately rather than precipitately.

Here, however, in a controversy revolving around the grave problem of a State's very structure of government, where virtually every issue was new, where no apportionment guidelines had ever been formulated here, and where *Gray* v. *Sanders*, 372 U.S. 368, 376, had specifically reserved the major issue in this case, viz., whether a State legislature can constitutionally be patterned on the Federal model, the district court, disregarding this Court's standards for the conduct of litigation involving States, harried and hurried the election officials who represented Delaware as though they were delaying compliance with a turnover order in bankruptcy.

B. It is common ground between the parties that the combination of the decree and the injunction below effectually prevent any amendment of the Delaware Constitution under either of the two amending methods therein provided.

One such method is the adoption of an amendment by a two-thirds vote of both houses of the General Assembly, followed by similar votes in the next General Assembly elected after an intervening general election. If the injunction entered below remains in force, then no second General Assembly can ever be elected.

The other method is amendment by Constitutional Convention. But if because of malapportionment a new General Assembly cannot be validly constituted, neither

can a Constitutional Convention, and for the same reason. This follows because the 1963 amendment continues the 1897 provisions for such a Convention, which do not even reflect the ten new Representative Districts provided for in that amendment.

The injunction cannot be supported as an exercise of sound discretion; the basic issue was at the very least, far too unclear. In fact, the injunction was issued after (1) the Supreme Court of Delaware had advised the Governor that since the district court's decree invalidating the 1963 amendment was not final but subject to appeal, he was required to act thereunder, and after (2) the Governor had acted accordingly.

Thus the entire constitutional apparatus of a State of the Union and its entire electoral machinery were paralyzed by Federal judicial decree because the Delaware election officials refused to accept as conclusive pending appeal the district court's Design for Delaware. It took an application to the Circuit Justice for a stay, promptly granted, to effect a return to normal judicial standards.

We feel no need to vary by a single word our earlier contention that what the district court did here "is more than an abuse of discretion. This is an abuse, a gross abuse, of judicial power."

C. Had the district court allowed the Delaware General Assembly more time; the reapportionment amendment could easily have been perfected. Such a plan, using the basic Federal pattern, but providing for the equalization of Representative and Senatorial Districts within each of the counties, has in fact been prepared since. The circumstance that no action has yet been taken thereon while the present appeal was pending by no means establishes that Delaware is either unwilling or unable to effect a proper apportionment once this Court has spoken.

Just as the actual enforcement of a judgment against a State of the Union, cf. *Virginia* v. *West Virginia*, 246 U.S.

565, is a step coming at the end of the judicial process, not to be lightly undertaken or even entertained, so in a State reapportionment case reapportionment by Federal judicial decree should be the very last resort, a step to be taken only when all else has failed. Yet the court below seems to have been irresistibly drawn to that course as the preferred first order of business, from the very beginning of the litigation and throughout its course. Finally, by disabling the State from ever amending its own Constitution, the district court here virtually assured to itself the task of reapportioning Delaware by Federal judicial decree, a task that Sincock *et als.* urged it to assume, and for which the presiding judge declared himself quite ready.

Only the current "Court of the Union" proposal would be equally as destructive of proper State-Federal relationships as the course so relentlessly pursued and pressed by the district court in this case.

ARGUMENT

This Delaware reapportionment case presents three new features not heretofore submitted to the Court in any of the similar reapportionment cases from the four other States—New York (No. 20), Alabama (Nos. 23, 27, 41), Maryland (No. 29), and Virginia (No. 69)—that are scheduled for argument commencing on November 12.

First. It is and has been argued in many reapportionment cases that States are forbidden to construct their legislatures on the Federal plan because, while the latter represented a compromise effected when the thirteen original States created the United States, the analogy is inapplicable within a State, because while a State creates counties, counties were never sovereign and hence did not create the State.

Whatever may be the case elsewhere, this too facile analysis is demonstrably untrue of Delaware. For Delaware was never a formal political unit until September

1776, when the Three Lower Counties of New Castle, Kent and Sussex, upon Delaware, created the Delaware State. At that point, those Counties had no real executive; they were banded together only in an Assembly in which each county was equally represented; they had no organic law; and in 1745 even the legitimacy of their legislature had been questioned by Lord Mansfield while Attorney General. These then, were sovereign Counties, and it was they who formed "The Delaware State."

Consequently, if there is any one State that is now completely free to follow the Federal arrangement for its legislature, Delaware is that State. Yet the court below brushed aside the facts of Delaware history—and with an epigram proceeded to ignore them.

Second. The Delaware election officials here have looked for the meaning of the Equal Protection Clause of the Fourteenth Amendment, not in preconceived notions of political philosophy sought to be injected into that Clause as a constitutional absolute for all time, not in the published views of Founding Fathers who had been dead for decades when the post-Civil War Amendments were being fashioned, but primarily and preeminently in the debates and in the legislation of the Reconstruction Congresses closest in time to the drafting, submission, ratification and enforcement of the Fourteenth Amendment.

These materials demonstrate that, when Congress was considering the readmission of the States that had been part of the Confederacy, a step that was expressly conditioned on ratification of the Fourteenth Amendment and which involved the most rigid scrutiny of the new constitutions submitted by those States, it readmitted two such States that patterned their legislatures on the Federal model, with an upper house apportioned by counties, so that in fact there were population discrepancies between the several senatorial districts on the order of between 5 and 6 to 1. Yet although the readmission process was a

long and frequently bitter one, although new conditions were imposed upon the more recalcitrant States, and although there was even discussion over whether "adoption" of the Fourteenth Amendment by a State legislature constituted compliance with the condition that this amendment be "ratified", the debates show that the primary concern of Congress was whether the new constitutions were republican in form and consistent with the specific prohibitions of the Fourteenth Amendment, see *United States* v. *Florida*, 363 U.S. 121, and—most significantly—that no one in either house of Congress, over a period of more than two years, ever said or even inferred that a State patterning its legislature on the Federal plan was thereby denying its citizens the equal protection of the laws.

These highly significant circumstances, as vital to an understanding of the Fourteenth Amendment as the *Records of the Federal Convention* and *The Federalist* are to an exposition of the original Constitution, were first presented in necessarily summary fashion in the Jurisdictional Statement in the present case. They were not mentioned, much less relied upon, when the Federal pattern was sustained in its application to a State legislature, as in the Maryland case below; they were not mentioned when, as in this case below, the district court held that the Equal Protection Clause prohibited a State from following the Federal arrangement; and the United States as *amicus curiae* in all of the other State cases, which asserts (U.S. Br. A.C., No. 29, p. 80) that "The framers were in agreement that, as to a State government, with full powers directly over the people, both houses must be apportioned on the basis of population," draws only on materials up to 1836, and studiously passes by in silence the Congressional enforcement of the Fourteenth Amendment in the Reconstruction period, action consistent only with precisely the opposite conclusion.

Third. This case raises another issue that should not go unnoticed, namely, the way that a Federal court has

here hurried and harried a State of the Union in a case involving the very structure of a State government. Consequently just as this Court in the long *Virginia* v. *West Virginia* litigation—which concerned merely a claim for money—proceeded slowly and patiently, so the district court here should have allowed the State of Delaware ample opportunity to amend its fundamental law to conform to what this Court would ultimately declare as the governing standards for State apportionment. Instead, the district court granted the officials here, who as nominal defendants represented the State, a mere 13-day stay, a circumstance that was reflected in the provisions of the amendment drafted under that deadline and ultimately adopted.

Finally, after entry of the decree below, and well before the time for appeal therefrom had expired, the district court, on its own motion and without notice or hearing, issued an injunction that paralyzed the State's entire electoral machinery, and that moreover effectively precluded the State of Delaware from ever amending its Constitution in either of the two ways provided in that instrument. Then, after the appeal from the final decree had been noted, the district court refused to stay the operation of its injunction pending appeal. While the latter ruling was promptly set aside by the Circuit Justice's stay, the fact that application here became necessary at all simply underscores the precipitancy of the district court's conduct of the present litigation.

I. THE FEDERAL ANALOGY OF AREA REPRESENTATION IN THE SENATE OF THE UNITED STATES IS FULLY AND EXACTLY APPLICABLE IN DELAWARE. WHERE COUNTIES WERE NEVER CREATURES OF THE STATE, BUT WHERE, TO THE CONTRARY, THE STATE WAS CREATED IN SEPTEMBER 1776 BY THE THEN EXISTING SOVEREIGN THREE LOWER COUNTIES.

Delaware's history is different from that of any other State; indeed, it is unique.

This Court should accordingly weigh that history most carefully, lest it make sweeping pronouncements regarding the relationships of States to their counties, that, however correctly they may set forth the devolution and development of the other States of the Union, would be plainly erroneous in the case of Delaware.

A typical such pronouncement underlies the currently held assumption of numerous practitioners of political science that the Federal analogy of area representation in one legislative house is inherently inapplicable, and hence unconstitutional, when followed in the governmental structures of the several States. See e.g., *One Man—One Vote.* (The Twentieth Century Fund, 1962) 9, where it is said: "Thus the Senate was a condition of union among a group of states which the Federal Government created by that union has no power to destroy. Counties, by contrast, were never independent or sovereign. They did not create the states but were created by them."

This facile generalization, which has now been espoused by the Solicitor General (U.S. Br., *A.C.*, No. 29, p. 82, n. 47, and p. 89; U.S. Br., *A.C.*, No. 20, p. 30), is demonstrably untrue of Delaware.

The several professors of political science who composed the pamphlet just quoted, like those who testified in this case, were generally unfamiliar with the history and traditions of the Delaware Counties (Tr. 64, 226-227, 366-376). We adduce those materials here, from historical materials well within the realm of judicial notice, and

from the testimony below of the State Archivist, Mr. Leon de Valinger, Jr., a recognized authority on Delaware history (Del. App. 12a-50a).

The traditions of the Delaware Counties had their beginnings in the early Dutch judicial districts in Delaware, of which there were two in 1673 (5 *Pennsylvania Archives, second series* [Harrisburg, 1877] 631); those districts were perpetuated by the Duke of York when they passed out of Dutch hands forever in that year (*Records of the Court of New Castle on Delaware, 1676-1681* [Col. Soc. of Pa., Lancaster, 1904] 6), and in 1680 the Duke created the third county (*id.*, at 385; Del. App. 15a-16a).[1]

In 1682, the Duke of York conveyed all three counties to William Penn (*New Jersey* v. *Delaware*, 291 U.S. 361, 364-365; for the deeds of feoffment, see 1 *Laws of Delaware* [1797] App. 1, 4). Two months later, William Penn joined the three counties to his own Province of Pennsylvania, in an Act reciting "that they may live under the same laws and government that the inhabitants of the said province of Pennsylvania, now do, or hereafter shall enjoy." (Act of Union, for annexing and uniting the counties of New-Castle, Jones's, and Whorekills, alias New-Dale, to the province of Pennsylvania, 1 *Laws of Delaware* [1797] App. 8, 9).[2] In 1683, Penn gave the counties their present name, Jones's becoming Kent County, while "Whorekills, alias New Dale" became Sussex County (Del. App. 16a).

These three counties on the Delaware were not originally a separate colony, but shared representation with the

[1] See, generally, De Valinger, *The Development of Local Government in Delaware 1638-1682* (Newark, Del., 1935), the thesis referred to in the testimony at Del. App. 12a, 13a, and 15a.

[2] This Act of Union was signed by Penn as "Proprietary and Governor of this province, and territories thereunto belonging, being the second year of his government, by the King's authority." 1 *Laws of Delaware* [1797] App. 10.

other counties in the Pennsylvania Assembly, in which each county had equal representation *qua* county (PTO, ¶C40; Del. App. 17a). Relations between the Province of Pennsylvania proper, and the three Lower Counties on the Delaware, or The Territories of Pennsylvania, as they were also called, were not harmonious, and when Penn granted his Charter of Liberties in 1701, it permitted within three years "a distinct Assembly for the Territories," with equal representation for each county (1 Thorpe 557, 561; 1 *Laws of Delaware* [1797] App. 31, 42-43).

As Judge Richard S. Rodney pointed out in his *Early Relations of Delaware and Pennsylvania*, 54 Pa. Mag. of Hist. & Biog. 209, 232, 235, 237, the last Assembly session in which the Province and the Three Lower Counties joined in legislation took place in September 1701, while the first Assembly for the Three Lower Counties met in November 1704; the latter body, pursuant to the charter, consisted of four, later six, representatives from each county.[3]

During the reign of Queen Anne, the caption in court records appeared as follows (De Valinger, ed., *Court Records of Kent County, Delaware, 1680-1705* [8 Am. Legal Records; Am. Hist. Assn. 1959] 340):

> "By the Queens Authority and in the Proprietarys Name Att a County Court or Court of Common Pleas held for the County of Kent One of the Countys of New Castle Kent And Sussex on Delaware * * *" *

Before the legislative separation, the enacting clause of legislation passed in the year 1700 appears in this form (1 *Laws of Delaware* [1797] 51):

> "Be it enacted, by the Proprietary and Governor, by and with the advice and consent of the freemen of

[3] Judge Rodney was a Justice of the Supreme Court of Delaware from 1922 to 1946, after which he became a United States District Judge. Although he retired on January 1, 1957 (237 F. 2d x), he is still active. See, e.g., *Small* v. *United States*, 219 F. Supp. 659 (D.Del.; June 1963).

this province, and counties annexed, in General Assembly met, and by the authority of the same."

A variant on the same page speaks of "the freemen of this province and territories."

Following the legislative separation, the enacting clause of a law passed in 1704 appears as follows (1 *Laws of Delaware* [1797] 55):

> "Be it enacted by the honorable John Evans, esq. with her Majesty's royal approbation Lieutenant Governor of the counties of New-Castle, Kent, and Sussex, on Delaware, and province of Pennsylvania, by and with the advice and consent of the freemen of the said counties, in General Assembly met, and by the authority of the same, * * *"

An interesting differentiation appears in an Act passed on November 4, 1742 (1 *Laws of Delaware* [1797] App. 62):

> "Be it enacted by the honourable George Thomas, esq. with his Majesty's royal approbation, Lieutenant Governor and Commander in Chief of the counties of New-Castle, Kent and Sussex upon Delaware, and province of Pennsylvania, under the honourable John Penn, Thomas Penn and Richard Penn, esqrs. true and absolute proprietaries of the counties and province aforesaid, by and with the advice and consent of the Representatives of the freemen of the said counties in General Assembly met, and by the authority of the same."

In the last Act passed before Independence, but after Lexington, Concord, and Bunker Hill (Act of Oct. 28, 1775; 1 *Laws of Delaware* [1797] 587, 588), the clause appears in these terms:

> "Be it enacted by the honorable John Penn, esq. with his Majesty's royal approbation, Governor and Commander in Chief of the counties of New-Castle, Kent and Sussex, upon Delaware, and province of Pennsylvania, by and with the advice and consent of

the Representatives of the freemen of the said counties in General Assembly met, and by authority of the same."

In the first part of the year 25 George II (June 1751-June 1752), there was passed an Act (1 *Laws of Delaware* [1797] 299, c. cxxii) "for the making and establishing a new Great Seal for the use of this government," which was ordered to be engraved (Sec. 3, p. 300) "with the arms of the King of Great Britain, and an inscription of the words, *Counties on Delaware*, and the figures 1751, round the same."

Interestingly enough, while during the period from 1700 to 1776, some 587 laws of the Province of Pennsylvania were submitted to the Privy Council for approval, no law enacted by the Assembly of the Three Lower Counties as such seems ever to have been so submitted (Report of the Special Master, pp. 40-41, filed in *New Jersey* v. *Delaware*, 291 U.S. 361, and confirmed by ¶1 of the Court's subsequent order, 295 U.S. 694).[4]

Three compilations of laws passed by the Assembly of the Three Lower Counties were printed during the Colonial period, two at Philadelphia in 1741 and 1752, respectively (1 *Catalogue of the Library of the Law School of Harvard University* [1909] 540; Def. Ex. 653, *NJ* v. *Del.*), and a third at Wilmington in 1763 (Def. Ex. 656, *NJ* v. *Del.*). Each is titled, "Laws of the Government of New-Castle, Kent and Sussex, upon Delaware."

Perhaps the most interesting document in respect of the light that it throws on the legal status of that government is a memorandum written by Attorney-General Sir William Murray (later Lord Mansfield, L.C.J.), in which was inclosed the petition of Mr. Ferdinando John Paris,

[4] The papers in this case, filed under No. 11, Orig., Oct. T. 1934, contain a mass of documentary material bearing on the early history of Delaware. Such papers will hereafter be cited simply by exhibit number and *NJ* v. *Del.*

London agent for the Penns, regarding the submission for approval of laws passed by the Assembly for the Three Lower Counties. The Attorney General wrote on September 1, 1745 (Pl. Ex. 494, *NJ* v. *Del.*):[5]

"OTHER ACTS, of other Assemblys, are usually laid before the Crown in Co'll [Councill], without any Pet'n at All, to introduce them; But, Such a method will not do, in the present Case; because tho other Assemblys, & their Powers & Constitutions, are very well known, Yet, it is not so, with Respect to the Assembly of the Lower Co'tys, From whence the present Act comes.

"And, as All Orders of Co'll, w'ch are made for approving American Acts of Assembly, recite that the Gov't, Co'll & Assembly of such a Province, are authorized to enact Laws & have enacted such a Law, w'ch Law, his Ma'ty thereby approves, We shall not be able, ever, to have an Order of Co'll drawn up (if this Act sho'd be approved) unless the Matter be specially introduced, with some Petition, to state the Many Special & Uncommon Circumstances, w'ch attend the Constitution & Gov'm't of the Three Lower Countys.

. . . . . .

"I am fearful of trusting Myself, in an Affair of this high Consequence, even to the Being of the Assembly of the Three Countys, For Grants to the Duke of York in 1663, 1674, & 1682, altho' they contain Powers to him, his Heirs & Assigns, & to his Deputys, Officers & Ministers, to make Laws, in the Tracts of Land thereby granted; do not, in express Terms, give them Liberty to call Assemblys of the People, or their Freemen, or their Deputys, for that Purpose.

. . . . . .

"I am of opinion that it is by no Means advisable for the Three lower Countys to present any Petition of this Sort at all; it would be stirring a General Ques-

[5] The original document is in the library of the Historical Society of Pennsylvania, under Misc. Papers of the Three Lower Counties, pp. 193-201.

tion in a very unfavorable Instance; And as the Crown has never yet approved of any of their Laws, it will be considered as a Stratagem to get some Countenance to their Legislative Authority, which I doubt will not yet bear a strickt Examination."

Accepting as true the Special Master's finding in *New Jersey* v. *Delaware* (Report, p. 41) that "The existence of a separate Assembly for the Delaware counties, and the exercise of all powers of legislature by such Assembly was well known to the Board of Trade and the crown authorities, and as in the case of Penn's assertion of his right as proprietary and owner, no action was ever taken by the Crown to challenge the power of government thus exercised," still that circumstance does not cure the defect noted by Sir William Murray, A.G. For, very obviously, prescription does not run against the Crown. The result is that long acquiescence, even with the fullest knowledge, does not do service for the non-existing Royal grant of legislative power.

A royal patent was in fact drawn, whereby James II undertook to grant to William Penn what is now Delaware. "* * * we have thought fit to erect and do hereby erect the aforesaid county and islands into a province and seigniory and do call it the Lower Pennsylvania and so from henceforth we will have it called." Under that grant, Penn would have had "full and absolute power to divide the said county and Island into towns, hundreds and counties, and to erect and incorporate Towns into boroughs and boroughs into cities." But this charter was never signed; its preparation was only completed on December 10, 1688, the night before James II fled from Whitehall and left England forever.[6]

---

[6] The text of the draft charter is Def. Ex. 550, *NJ* v. *Del.*; the quoted passages are from pp. 7 and 12, respectively. The original is in the Penn Papers of the Historical Society of Pennsylvania. The text is also available in Konkle, *Delaware: A Grant Yet Not a Grant*, 54 Pa. Mag. of Hist. & Biog. 241, 245-254.

In sharp contrast to virtually every other colonial legislature in British North America, the Three Lower Counties had no council or upper house whatever. As a matter of practice, if the Governor or Lieutenant Governor disagreed with any portion of an act passed by the Assembly, he would return it with his objections, following which it would be amended to meet those objections and repassed, or else further correspondence or conferences would ensue. The operation of this legislative process, which may well have been unique, is clearly reflected in the two published volumes of early legislative records. *Minutes of House of Assembly of the Government of the Counties of New Castle Kent and Sussex upon Delaware at Sessions held at New Castle in the Year 1739* (Pub. Archives Comm. of Del. 1929); *Minutes of House of Representatives of the Government of the Counties of New Castle, Kent and Sussex upon Delaware at Sessions held at New Castle in the Years 1765-1770* (Pub. Archives Comm. of Del., 1931 [reprint of 1770 original]).

What, then, was the status of the Three Lower Counties upon Delaware prior to Independence?

Judge Rodney wrote (*Early Relations of Delaware and Pennsylvania*, 54 Pa. Mag. of Hist. & Biog. 209, 218, 240):

> "The territory now embraced in our little State was an anomaly among the English colonies. No sovereign's charter gave us a name and with all the panoply and emblazonments of Royalty granted our land to settlers. As a matter of fact, although we had a distinct existence with a separate assembly from 1704, yet, with the exception of 'The Territories of Pennsylvania' or the "Three Lower Counties on the Delaware" (neither of which names was authoritatively established), we never had a name until our First Constitution of 1776, adopted pursuant to the Resolution of the Continental Congress, gave us our name as 'The Delaware State.' * * *"

* * * * * *

"* * * after the [legislative] separation, the slender thread of a common Governor was all that bound the Counties to the Province.

* * * * *

"From the beginning of the Colony two ties bound us to the Province of Pennsylvania—the Legislative and Executive bands. * * * When [the Legislative Union] was severed nothing but a thin Executive or Proprietary ligament joined us to any outside power, and when the Declaration of Independence threw off this last connection and placed the Executive Power in the people themselves, then the long familiarity with legislative freedom established by almost eight decades of independent action (during which no laws were ever submitted for approval to the crown), allowed the Delaware State to smoothly glide into and through the Confederation of Colonies and emerge as the First State of the New Union."

Before we turn to the events of 1776, two digressions are in order.

First, in the famous lawsuit between William Penn and Lord Baltimore, which was ultimately settled by the drawing of the Mason-Dixon line, there were determined not only the boundaries between Pennsylvania and Maryland, but also those between Lord Baltimore's Province of Maryland and Penn's Territories or Three Lower Counties on Delaware. See *Penn* v. *Lord Baltimore*, 1 Ves. Sen. 444; s.c. *sub nom. Pen* v. *Lord Baltimore*, Ridg. t. H. 333; see map at 87 Pa. Mag. of Hist. & Biog. 290 (July 1963 issue).

Second, during the years immediately preceding 1776, contemporaries almost invariably referred to what is now Delaware as the Lower Counties.

In the early Journals of the Continental Congress, they are referred to in various ways: as "Delaware Counties" (1 J. Cont. Cong. 50; 2 *id.* 12), "the counties on Delaware" (4 *id.* 226), "3 counties" (1 *id.* 28, 29), "Lower Counties" (4 *id.* 400), "the Lower Counties on Delaware" (1 *id.* 82,

103, 2 *id.* 18; 3 id. 418, 429), "the Counties of New Castle, Kent and Sussex, on [or "upon"] Delaware" (1 *id.* 90, 105, 115; 3 *id.* 304, note 1), "the three lower counties on Delaware" (4 *id.* 68-69, 80), "the three lower counties of New Castle, Kent, and Sussex on Delaware" (*id.* 75-76; cf. 1 *id.* 80), "New Castle, Kent and Sussex on Delaware" (1 *id.* 14, 66), "the three lower counties on Delaware government" (4 *id.* 130, 132; cf. 5 *id.* 436, "counties on Delaware for the use of the militia of that government").

While the official though self-assumed name of this loose alliance was "The Government of the Counties of New Castle, Kent, and Sussex, upon Delaware" (*Minutes of House of Assembly* • • • *1739, Minutes of House of Representatives* • • • *1765-1770*, both *supra;* Preamble to Del. Const. 1776, 1 Thorpe 562; see 1 J. Cont. Cong. 21), the Journals of the Continental Congress, prior to Statehood, contain only some scattered references to a "Delaware Government" (plate facing 1 J. Cont. Cong. 120; 1 *id.* 28; 3 *id.* 304; 4 *id.* 349, 413; 5 *id.* 436, 440, 631, 644). And, as has been seen, that government's seal was inscribed "Counties on Delaware."

We have found no references, whatever, in any form of words, to the three counties *of* Delaware.

Contemporaneous writing reflect the same usage. Thus, Samuel Ward of Rhode Island, a delegate to the Continental Congress, noted in his diary for Sept. 11, 1775 that "several Pennsylvania, lower County, Maryland, Virginia and South Carolina and Georgia delegates met" (1 Burnett, ed., *Letters of Members of the Continental Congress*, 192). Similar usage appears in the Adams and Jefferson papers (2 *Diary and Autobiography of John Adams* (Butterfield ed. 1961) 114, 121, 189, 190, 193, 204, 206, 207; 1 Burnett, *supra*, 490, 491 (letter John Adams to Samuel Chase, June 14, 1776: "McKean has returned from the lower counties with full powers"); 1 *The Papers of Thomas Jefferson* (Boyd ed.) 182, 310, 311, 314).

Independence for the Three Lower Counties was triggered by a resolution of the Continental Congress adopted on May 10, 1776 (4 J. Cont. Cong. 342),

> "That it be recommended to the respective assemblies and conventions of the United Colonies, where no government sufficient to the exigencies of their affairs have hitherto been established, to adopt such government as shall, in the opinion of the representatives of the people, best conduce to the happiness and safety of their constituents in particular, and America in general."

John Adams later exulted in his Autobiography (3 *Diary and Autobiography of John Adams, supra*, 383), "This Resolution I considered as an Epocha, a decisive event."

Five days later, Congress adopted a rousing preamble to the foregoing resolution, drafted by a Committee of which Adams was a member, which said in pertinent part (4 J. Cont. Cong. 357, 358),

> "And whereas, it appears absolutely irreconcileable to reason and good Conscience, for the people of these colonies now to take the oaths and affirmations necessary for the support of any government under the crown of Great Britain, and it is necessary that the exercise of every kind of authority under the said crown should be totally suppressed, and all powers of government exerted, under the authority of the people of the colonies, for the preservation of internal peace, virtue, and good order, as well as for the defence of their lives, liberties, and properties, against the hostile invasions and cruel depredations of their enemies; therefore, resolved, &c."

When the preamble was adopted, Adams noted (3 *Diary and Autobiography of John Adams, supra*, 386), "Mr. Duane called it, to me, a Machine for the fabrication of Independence. I said, smiling, I thought it was independence itself: but We must have it with more formality yet."

In a somewhat more mundane vein, Caesar Rodney, a delegate to Congress from the Three Lower Counties, had written concerning the entire resolution (Ryden, ed., *Letters to and from Caesar Rodney, 1756-1784* [1933] 79, 89), "Continuing to Swear Allegiance to the power that is Cutting our throats, and attesting jurors to keep the Secrets and try offenders against the peace of our Sovereign Lord the King &c is Certainly absurd."

Following an acrimonious local controversy as to whether any change in government was necessary, the Assembly of the Three Lower Counties met on June 11, 1776 (Part 1, "The Three Lower Counties Become the Delaware State," in John A. Munroe, *Federalist Delaware, 1775-1815* (1954) 15). Then, on June 14, "In the House of Representatives for the Counties of Newcastle, Kent, and Sussex, upon Delaware, at Newcastle," a certified copy of the Continental Congress's resolution-cum-preamble was read—it had been personally presented by Thomas McKean, another of the Lower Counties' delegates to Congress—whereupon it was unanimously resolved "That this House do approve of the said Resolution of Congress," (Force, *American Archives*, 4th series, vol. 6, pp. 883-884).

On the next day, the Assembly adopted and passed the following additional resolution (Force, *ut supra*, at 884):

> "Whereas it is become absolutely necessary for the safety, protection, and happiness of the good people of this Colony, forthwith to establish some authority adequate to the exigencies of their affairs, until a new Government can be formed: And whereas the Representatives of the people, in this Assembly met, alone can, and ought at this time, to establish such temporary authority:
>
> "*Resolved unanimously*, That all persons holding any office, civil or military, in this Colony, on the 13th day of *June* instant, may, and shall continue to exercise the same, in the name of the *Government* of the

> Counties of *New Castle*, *Kent*, and *Sussex*, upon *Delaware*, as they used legally to exercise it in the name of the King, until a new Government shall be formed, agreeable to the Resolution of Congress of the 15th of *May* last."

Caesar Rodney himself had written (Ryden, *supra*, at 81) that he thought the foregoing resolution amounted to a declaration of independence. Munroe accordingly concludes (*supra*, p. 15), that "June 15, 1776 is the real birth date of an independent Delaware. The action taken that day to divorce the three counties from Great Britain was supported by the joint action taken in Congress on July 2, 1776, birth date of the nation."

But, he adds (*supra*, p. 83), "The new government was not formed until after a state constitution was adopted on September 20; meanwhile Delaware was governed under the terms of the June 15 resolution by its old colonial officials, the one notable change being that Caesar Rodney, as speaker of the Assembly, had replaced Governor John Penn as the chief executive."

On July 4, 1776, Caesar Rodney—who while Delegate to Congress was simultaneously Speaker and quondam chief executive—issued from Philadelphia summonses to the sheriffs to call the members from the three counties to meet at Newcastle on July 22 (Ryden, *supra*, 94).

When the Assembly met, it resolved on July 27 (*Proceedings of the Convention of the Delaware State held at New-Castle on Tuesday the Twenty-Seventh of August, 1776* [Wilmington, 1776; pagination from 1927 reprint] 5-6):

> "That it be recommended to the Good People of the several Counties in this Government to chuse a suitable Number of Deputies to meet in Convention, there to ordain and declare the future Form of Government for this State.

"Resolved also,

"That it is the Opinion of this House, That the said Convention consist of the Number of Thirty Persons, that is to say, Ten for the County of New-Castle, Ten for the County of Kent and Ten for the County of Sussex; and that the Freemen of the said Counties respectively, do meet on Monday the nineteenth day of August next, at the usual Places of Election for the County, and then and there proceed to elect the Number of Deputies aforesaid, according to the Directions of several Laws of this Government for regulating Elections of the Members of Assembly, except as to the Choice of Inspectors, which shall be made on the Morning of the Day of Election by the Electors, Inhabitants of the respective Hundreds in each County."

By some quirk of local politics, Caesar Rodney was not elected to the Convention (*Proceedings*, 6-7), which chose George Read as its President. It functioned in part as a normal legislature, particularly with respect to military matters and military appointments, which in the summer of 1776 plainly could not wait on a new form of government (*Proceedings*, 10-12, 14-16, 20-23, 36-43). On September 11, 1776, the Convention adopted "A Declaration of Rights and Fundamental Rules of the Delaware State, formerly stiled, The Government of the Counties of New-Castle, Kent and Sussex, upon Delaware" (*Proceedings*, 17-20; 1 Del. Code Ann. [1953] 81-83; see Farrand, *The Delaware Bill of Rights of 1776*, 3 Am. Hist. Rev. 641; H. Clay Reed, *The Delaware Constitution of 1776* (Delaware Notes, 6th Series, 1930) 7, 22-23).[7]

Finally, on September 20, 1776, the Convention adopted a Constitution (1 Thorpe 562; 1 Del. Laws [1797] App. 82-91; 1 Del. Code Ann. [1953] 85), under which Delaware was to be governed for sixteen years, and whose first article provided that—

---

[7] By a strange oversight, this document does not appear in Thorpe's *Federal and State Constitutions*.

> "The government of the counties of New-Castle, Kent and Sussex, upon Delaware, shall hereafter in all public and other writings be called, *The Delaware State.*"

It was not until then that the Journals of the Continental Congress refer to "Delaware State" (6 J. Cont. Cong. 1000, document dated Nov. 8, 1776).

What can we say of the political nature or quality of the Three Lower Counties before that date?

As has been seen, they had a separate legislative assembly from 1704, in which each county was equally represented. They shared their executive with Pennsylvania, but never had any council. Over a period of more than 70 years, their laws were never submitted to the Privy Council for approval, and Lord Mansfield (*supra*, pp. 38-39) seriously questioned whether their Assembly had ever been lawfully constituted as a legislative body.

Such sovereignty as there was resided in the separate counties (Del. App. 20a). After June 15, 1776, the old executive was discarded, and the Speaker of the Assembly assumed certain ministerial functions of an executive nature, in much the same attenuated sense that the President of Congress was the only executive available to the newly independent United States. But who, other than the Speaker of the Assembly, was even the nominal executive of the Lower Counties in August and September 1776 when the Convention acted as a legislature and the Speaker no longer functioned as such?

The hard fact of the matter is that there was then no executive at all, except possibly for the convention itself, and that some or all of the Three Lower Counties could, had they been so minded, have joined Pennsylvania or Maryland or formed separate States. This significant point is not in dispute between the parties; the testimony on this issue of Delaware's Archivist, Mr. de Valinger (Del. App. 28a),

is fully concurred in by Dr. Royce Hanson, Associate Professor of Government and Public Administration at American University, whom Sincock *et als.* called as an expert.[8]

The Three Lower Counties were not so minded, because they had a long tradition of allied separatism. Once the sovereignty of the Proprietary and the suzerainty of the crown were thrown off, the Three Lower Counties upon Delaware became a loose confederacy of independent units, just as the United States, under the Articles of Confederation, were a loose confederacy of sovereign States.

But whereas the Articles of Confederation carefully spelled out the powers that were delegated to Congress, the limitations placed on the States, and the relations that the States were to observe among themselves, the Three Lower Counties had no instrument of government whatever. The Three Lower Counties' very existence as a confederated alliance rested solely on William Penn's duly observed promise of "a distinct Assembly for the Territories," and on such laws as that "distinct Assembly" had enacted over the years. And yet, as has been seen, a lawyer as profound as Lord Mansfield had questioned the legitimacy of this very Assembly, which was the sole ligament joining the counties together.

---

[8] Here is the latter's testimony on cross-examination (Tr. 287):

"Q Do you know what choices the so-called three lower counties of Delaware had on July 4, 1776?

"A I am not sure I know all three choices. I believe one was union with Pennsylvania, one was union with Maryland, and another was to form the State of Delaware.

"Q You say one was union with Pennsylvania, one was union with Maryland, and one choice was to form the State of Delaware?

"A Yes.

"Q I presume that another choice was that these counties could have insisted that they be individual states?

"A I suppose they could, yes."

"The United States of America;" as an entity, existed before the Constitution; the quoted title was given by Art. I of the Articles of Confederation. The United States of America had contracted alliances, waged and won a war, and made treaties, well before George Washington was inaugurated President under the Constitution at New York on April 30, 1789. Contrariwise, despite the circumstance that they termed themselves a "government" and a Colony, the Three Lower Counties did not become a formal political unit in fact until the Constitution of September 20, 1776, was adopted. This latter conclusion accords with the view of modern historians. See Cochran and Andrews, eds., *Concise Dictionary of American History* (1962), *s.v.* Delaware.

Consequently, for the political scientists to generalize (*One Man-One Vote*, 9) that "Counties, by contrast, were never independent or sovereign," is simply to demonstrate anew the inherent fallibility of generalizations—and, perhaps, of political scientists as a group.

Turning to the terms of the Delaware Constitution of 1776, the instrument that created "The Delaware State," we find that, in all but one vital respect, the new government differed but little from the old: its legislature was was bicameral, to supply the lack of a second house—as we have pointed out, the Three Lower Counties never had a council. The result was that, whereas in other States that created new governments when Independence came the legislatures had greatly increased in power at the expense of the former colonial (and hence, except in Connecticut and Rhode Island, *royal*) governors, in Delaware it was a sufficient check to divide the legislature and have the two parts curb each other. Cf. H. Clay Reed, *The Delaware Constitution of 1776*, *supra*, 26-27. And to remove all taint of monarchy, the new executive was named "A President, or Chief Magistrate" (Del. Const. 1776, Art. 7; 1 Thorpe 563). Interestingly enough, the Delaware Con-

stitution of 1776 "was the first to be written by any State through a device now generally considered correct, the election of a special convention for that purpose," Munroe, *supra*, 84.

In the Delaware Constitution of 1776, as well as in those later adopted, in 1792 and in 1831, the three counties were equally represented in the State Legislature, each with three members in the upper house, called first the Council and then the Senate, and each having seven representatives in the lower house, called first the House of Assembly and then the House of Representatives.

As has been shown above, pp. 15-16, it was 1897 before any Delaware Constitution deviated from the pattern of equal legislative representation for each county in both houses. In that year, by Art. II, §2 of the Constitution then adopted (J.S. App. A71-A75), the State was divided into 17 Senatorial and 35 Representative Districts. Five Senatorial Districts and ten Representative Districts each were assigned to Sussex County, to Kent County, and to "rural" New Castle County—i.e., outside the City of Wilmington—while Wilmington was assigned two Senatorial and five Representative Districts (PTO ¶¶ C4-5). The debates in the 1897 Constitutional Convention show that this plan represented a compromise (PTO, ¶10).

The 1963 amendment, which became effective on January 17, 1963, see *Opinion of the Justices*, 190 A. 2d 519, resulted in the addition of one representative to each of two Representative Districts in Wilmington, one representative to one such District in rural New Castle County, two representatives to two such Districts, and three representatives to another. It resulted in no changes in either Kent or Sussex Counties, so that the net result was to add 10 representatives from New Castle County to the House of Representatives; this came to 45 Representatives in all. In the Senate, the 1963 amendment resulted in each County having seven Senators. The existing Senatorial Districts

were retained intact, while the two additional Senators for each of Kent and Sussex Counties were to be elected by half of each county at large. See *supra*, pp. 8-9.

And, as has also been shown in detail, pp. 15-16, *supra*, the Delaware counties that created "The Delaware State" in September 1776 have continued to be strong governmental units that still exercise many governmental functions.

The foregoing detailed historical review of the formation of Delaware as a State, based as it is upon original documents, demonstrates that in Delaware the Counties made the State, and not—as may or may not have been true elsewhere—*vice versa*. Consequently one of the stock arguments currently being made against area representation is one house of a State legislature is wholly inapplicable when sought to be applied to Delaware.

After June 15, 1776, the Delaware Counties were the loosest kind of federation, lacking any executive as such, lacking even any charter or frame of government, joined only in an assembly composed of an equal number of delegates from each of them. The result was that sovereignty necessarily resided in each of the three constituent units. Moreover, contemporaneous references to them in the Journals of the Continental Congress and in the writings of the delegates to that body as—in variant forms—"the three lower counties on Delaware," make it plain that American statesmen of the Revolutionary period never regarded the Lower Counties as constituting an indivisible, unitary body. Significantly, the references are always to the counties *on* or *upon* Delaware, never to the counties *of* Delaware. Not until the three Delaware Counties, each sending ten delegates to a convention, framed a Constitution in September 1776, was "The Delaware State" created as a formal political unit.

Thus, whatever may be the case elsewhere, the Federal analogy is fully applicable to, and indeed was anticipated by, Delaware. Just as the several States, joined together under the Articles of Confederation, formed the present Federal Union in which each State, regardless of size, has equal representation in the Senate, so the Three Lower Counties upon Delaware, much more loosely linked, without any real executive head, without even any charter or instrument of government to allocate or distribute their powers, and with an autonomous Assembly in which each county had had equal representation from the very beginning as the only nexus between them, formed a State in September 1776 in both houses of whose legislature, under successive Constitutions for more than a century and a quarter, each county was equally represented.

To argue, as the appellees did below, and as the Solicitor General argues as *amicus curiae* in No. 29 and related cases, that equal county representation in the Delaware Senate under the 1963 amendment to the Delaware Constitution now violates the Equal Protection Clause, is to do violence not only to history but also to Delaware tradition and to the very essence of American Federalism.

The presiding judge below disposed of the foregoing historical facts duly laid before him at the trial (Del. App. 12a-50a), not on the footing that they were inaccurately set forth, either in detail or by way of emphasis, but simply on the ground (J. S. App. A45) that while "history must be deemed to deserve a little more courtesy than a mere distant bow," it was entitled to "no submissive genuflexion." What this amounts to, in plain English, is that the district court baldly brushed aside any and all Delaware history that it deemed inconsistent with its own blueprint for Delaware's future.

Sincock *et als.* for their part boldly assert (M/A 9-10) that "Delaware history is replete with the rejection of the county sovereignty argument and its concurrent Federal

analogy''—and then quote two two-sentence passages from the *Debates and Proceedings of the Constitutional Convention of the State of Delaware, 1896-1897*. Inasmuch as these particular *Debates and Proceedings* extend to no less than 3472 printed pages by actual count, exclusive of the index, it will readily be apparent that the word ''replete'' in the assertion just quoted reflects optimism rather than accuracy.

The further suggestion of Sincock *et als.* (M/A 9), that since Delaware in 1897 departed slightly from equal county representation in the Senate, it was no longer free under the Federal Constitution to return to it in 1963, is too reminiscent of a child's game of forfeits to be taken seriously.

II. ADOPTION BY A STATE OF THE FEDERAL PLAN FOR THE COMPOSITION OF ITS LEGISLATURE, WHEREBY ONE HOUSE IS APPORTIONED BY POLITICAL SUBDIVISIONS RATHER THAN BY POPULATION, DOES NOT NOW, AND AS DEMONSTRATED BY CONTEMPORANEOUS CONGRESSIONAL LEGISLATION NEVER DID, VIOLATE THE EQUAL PROTECTION CLAUSE

It is the fact, fully documented below, that the Reconstruction Congresses closest in time to the drafting, submission, and ratification of the Fourteenth Amendment's Equal Protection Clause, and which imposed ratification of that Amendment—and of that Clause—as a prerequisite to the readmission of the former Confederate States, did not hesitate to readmit several such States whose new constitutions did not require both houses of their legislatures to be apportioned according to population, in two instances approving constitutions providing for county representation in their senates that resulted in population disparities of between 5 and 6 to 1 in their senatorial districts.

Yet in the other State cases now pending here it is contended, as it was held in this case below, that the Equal Protection Clause prohibits a State from modeling its legislature on the Federal pattern, and that while weight

may be given in apportioning one legislative house to factors other than population, the population disparities in the other house must not be too striking.

Those views have here the weighty support of the United States as *amicus curiae* in all of the other State cases (Nos. 20; 23, 27, & 41; 29; 69), and can muster in their favor some eleven State and Federal decisions (see U.S. Br. A.C., No. 29, pp. 50-51; cf. *id.*, pp. 26-28), including the final opinion below in the present case (J.S. App. A16-A67).

But this apparent weight of numbers reflects, not any reasoned and documented view, for it is nowhere documented, but rather a frightening example of *communis error fecit jus*. For, in not a single one of those cases, either in this one or in any of the others, did the courts make the slightest effort to ascertain the views of those who drafted the Equal Protection Clause.

Moreover, the United States, which has favored the Court with copious excerpts from the records of the Constitutional Convention and the ratification contest, as well as later reminiscences on the part of participants in both (U.S. Br. *A.C.* No. 29, App. B, pp. 1-113), and also with expressions from the writings of Jefferson and Madison regarding the apportionment of State legislatures (*ibid.*, pp. 114-118), stops with the death of Madison in 1836—and never once goes on to seek, much less quote, any expressions or actions contemporaneous with the adoption of the Fourteenth Amendment.

The result is that virtually all of the contentions made to this Court regarding the meaning of the Equal Protection Clause reflect views that are supported primarily if not wholly by the personal preferences of the writers. Certainly that was so below; the prevailing opinion of the district court simply reads into the Equal Protection Clause what the author judge would have placed there as an original proposition.

We think it too plain for anything beyond mere statement that this Court should not undertake to adjudicate the reach of the Equal Protection Clause in the present group of State reapportionment cases without examining in detail the contemporaneous Congressional construction of that Clause by the Reconstruction Congresses, which so carefully, see *United States* v. *Florida*, 363 U.S. 121, scrutinized the new constitutions of the formerly seceded States before readmitting them once more to the Union.

We likewise think it too plain for anything beyond mere statement that those contemporary materials, from 1868 to 1870, shed far more light on the meaning of the Equal Protection Clause, which dates from 1866, than do the expressions from 1776 to 1836, with which the brief of the United States as *amicus curiae* in No. 29 stops.

And we are confident that, when the contemporaneous legislative materials are examined, materials that represent an exercise of Congressional enforcement of the Fourteenth Amendment under Section 5 thereof (J.S. App. A71), it will become crystal clear that the Reconstruction Congresses that were so busily and indeed bitterly engaged in imposing that Amendment on the former Confederate States found in such of their constitutions as provided for a State legislature on the Federal pattern no inconsistency whatever with the Equal Protection Clause.

A. Contemporaneous Congressional legislation readmitting the former Confederate States establishes conclusively that State constitutions providing for senates apportioned on an area basis were never deemed to violate the Equal Protection Clause

Inasmuch as every reapportionment contention ever made rests on the Equal Protection Clause of the Fourteenth Amendment, a provision that was submitted to the States in 1866 (Joint Res. of June 16, 1866, No. 48, 14 Stat. 358) and proclaimed a part of the Constitution in July

1868 (Proc. No. 11, July 20, 1868, 15 Stat. 706; Proc. No. 13, July 28, 1868, 15 Stat. 708), we must look for the intentions of its draftsmen in the records of these years. We cannot rely on what was said or done by those who framed the Constitution and the Bill of Rights, because, very obviously, the last of the Framers had departed this life long before the adoption of the post-Civil War Amendments, particularly the Fourteenth, that so drastically altered the distribution of governmental power between the Nation and the States. Nor can we properly rely on those who, in disregard of the views of the Framers of the Fourteenth Amendment, seek to read their own current political predilections into the generalized language of the Equal Protection Clause.

No judge or lawyer anywhere in the land would undertake to construe the Constitution of the United States without examining the *Records of the Federal Convention* or Elliot's *Debates;* why then should anyone even attempt to interpret the Fourteenth Amendment without reference to the *Congressional Globe* or to Congressional documents?

First. Eleven States seceded from the Union in the Civil War. Tennessee, the first one restored, by the Joint Resolution of July 24, 1866, No. 73, 14 Stat. 364, escaped Reconstruction, which was duly visited on the remaining ten by the Acts of March 2, 1867, c. 153, 14 Stat. 428, March 23, 1867, c. 6, 15 Stat. 2, and July 19, 1867, c. 30, 15 Stat. 14.

The basic Reconstruction Act of March 2, 1867, declaring illegal the existing State governments in the remaining ten former Confederate States, and substituting military governments by districts in lieu thereof, provided in its Section 5 (14 Stat. at 429) that none of the ten would be readmitted until they first ratified the then pending Fourteenth Amendment. The second Reconstruction Act, of March 23, 1867, provided for the calling of conventions

at which the several States involved would draft new constitutions.

Thereafter, in June 1868, before the Fourteenth Amendment had become a part of the Constitution on any footing (compare the Proclamations of July 20 and 28, 1868, *supra*, 15 Stat. 706 and 708), the Fortieth Congress provided for the readmission of Arkansas, which had already ratified that Amendment (Act of June 22, 1868, c. 69, 15 Stat. 72), and, a few days later, provided for the readmission of six more former Confederate States then undergoing Reconstruction, on condition that each ratify the Fourteenth Amendment. Act of June 25, 1868, c. 70, 15 Stat. 73 (Alabama, Florida, Georgia, Louisiana, North Carolina, South Carolina). Two years later, during the Forty-first Congress, provision was made for the readmission of the remaining three former Confederate States. Act of Jan. 26, 1870, c. 10, 16 Stat. 62 (Virginia); Act of Feb. 23, 1870, c. 19, 16 Stat. 67 (Mississippi); Act of March 30, 1870, c. 39, 16 Stat. 80 (Texas). Georgia, for reasons set out below, was not finally readmitted until passage of the Act of July 15, 1870, c. 299, 16 Stat. 363.

Second. (1) The new constitutions of five of the foregoing States duly provided for the apportionment of both houses of the legislature on the basis of population. Ala. Const. 1867, Art. VIII, §§1, 3 (1 Thorpe 132, 145-146); Ark. Const. 1868, Art. V, §8 (1 Thorpe 306, 310-311); Miss. Const. 1868, Art. IV, §§34, 35 (4 Thorpe 2069, 2074); N.C. Const. 1868, Art. II, §§5, 6 (5 Thorpe 2800, 2804); Tex. Const. 1868, Art. IV, §11 (6 Thorpe 3591, 3594-3595).

(2) The constitutions of three other readmitted States assigned senators by districts; the extent to which their provisions in that regard reflected population, or emphasized area primarily, or what weight they gave to each factor, does not appear from the face of the several instruments. Fla. Const. 1868, Art. XIV, ¶2 (2 Thorpe 704, 719); La. Const. 1868, Tit. II, §22 (3 Thorpe 1449, 1451-

1453); Va. Const. 1870, Art. V, §3 (7 Thorpe 3871, 3882-3883).

(3) Two of the newly admitted States adopted constitutions that plainly provided, on their face, for area representation in one house of the legislature. Georgia's constitution allowed one senator for each of 44 districts of three contiguous counties each, quite unrelated to population. Ga. Const. 1868, Art. III, §2 (2 Thorpe 822, 827-828). South Carolina adopted a constitution under which each county was entitled to one senator, the only nod to population being that Charleston County alone was allotted two senators. S.C. Const. 1868, Art. II, §8 (6 Thorpe 3281, 3286).

Third. At the time that each of the last five States was readmitted, the 1870 Census had not been taken, and the last available population figures were those contained in the Eighth Census of 1860. All too plainly, the latter could only reflect the approximate population in 1868, particularly after the dislocations caused by four years of war in four of the States whose new constitutions did not apportion their senates on a population basis; only Florida had escaped largely unscathed by military operations. But, with all their obvious deficiencies, the 1860 census figures were the only ones available to any one who in 1868 or early in 1870 sought to examine those five new constitutions with a view to ascertaining the extent of what since 1962 has been semantically characterized as "dilution" or "debasement" of voting power.

Here are the results of the correlation of the senatorial provisions of the five constitutions of former Confederate States now involved with the 1860 census figures.[9]

---

[9] All of the latter are taken from *Population of the United States in 1860; compiled from the Original Returns of the Eighth Census, under the direction of the Secretary of the Interior* (Washington, 1864). The figures appear therein alphabetically by States, and the aggregate population of each county appears for each State in Table 2, "Population by Color and Condition."

Florida. Article XIV of the Florida Constitution of 1868 (2 Thorpe 704, 719), entitled "Census and Apportionment," provided as follows:

> "The legislature shall, in the year [1875], and every tenth year thereafter, cause an enumeration to be made of all the inhabitants of the state; and they shall then proceed to apportion the representation among the different counties, giving to each county one representative at large, and one additional to every one thousand registered votes therein, but no county shall be entitled to more than four representatives.
>
> "The legislature shall also, after every such enumeration, proceed to fix by law the number of senators which shall constitute the senate of Florida, and which shall never be less than one-fourth nor more than one-half of the whole number of the assembly. When any senatorial district shall be composed of two or more counties, the counties of which such district consists shall not be entirely separated by any county belonging to another district, and no county shall be divided in forming a district, and all counties shall remain as now organized unless changed by a two-thirds vote of both houses of the legislature."

Unspecific as these provisions may be, they none the less left room for large disparities as the population of the State was then distributed. Under the 1860 census, the most populous county in Florida was Leon County, with 12,343 inhabitants, and the least populous was Dade County, with only 83.

In order to ascertain the number of persons from which registered voters might be drawn, we omit all females, then still not permitted to vote, and all inhabitants under 20 years of age. This leaves 39 potential voters in Dade County, and 2952 in Leon County. Supposing lack of interest or lack of qualifications to cut registration to 60 per cent of the eligibles in each instance, this would entitle 24 voters in Dade County to one representative,

and 1771 voters in Leon County also one representative, or a ratio of 73.7 to 1.

The first Senator from Florida elected under its new constitution presented himself on June 30, 1860 (Cong. Globe, 40th Cong., 2d sess., p. 3598). A long debate ensued, not over whether the voting discrepancies in that constitution involved a denial of the equal protection of the laws to any person in Florida, but only over the question whether the Florida legislature, which had passed a resolution "adopting" the Fourteenth Amendment, had in consequence complied with the condition in the Act of June 25, 1868, *supra*, which required a "ratification." A motion to refer this weighty question to the Committee on the Judiciary was defeated (p. 3602), but it took five more printed pages of argument before the Senator-elect from Florida was permitted to be sworn (p. 3607).

The second Senator from Florida took the oath two days later without further discussion (p. 3672), while the Florida Congressman was similarly admitted following routine overnight examination of his credentials (pp. 3614, 3655).

Louisiana. Title II, Sec. 22, of the Louisiana Constitution of 1868 (3 Thorpe 1449, 1451-1453) provided for twenty-four senatorial districts, one of which was given three senators, ten of which were given two senators, and the balance one senator each.

Certain of these senatorial districts, four of which were based on a combination of representative districts in the City of New Orleans, and one of which involved a geographical division of Orleans Parish, cannot be correlated with the 1860 census figures.

Of the remainder, always dividing the population in the case of the two-senator districts to ascertain the population per senator, the most populous was the district consisting of Concordia and Avoyelles Parishes, given one

senator for 26,972 inhabitants, and the least populous the one composed of Ouachita and Caldwell Parishes, given one senator for 9560 inhabitants.

The resultant discrepancy is 2.82 to 1. Yet Louisiana's new Senators were permitted to take their oaths on July 17, 1868, without discussion, upon presentation of their credentials and of the resolution of the Louisiana legislature ratifying the Fourteenth Amendment (Cong. Globe, 40th Cong., 2d sess., p. 4151). Admission of Louisiana's Representatives was similarly routine (pp. 4186, 4213, 4215-4216).

Virginia. Article V, Sec. 3 of the Virginia Constitution of 1868 (7 Thorpe 3871, 3882-3883), provided for 40 senatorial districts, the composition of which was duly prescribed. The most populous of these districts, composed of Stafford, Spottsylvania, and Louisa Counties, showed a population in 1860 of 41,332 inhabitants; the least populous, comprising Petersburg City alone, had an 1860 population of only 18,266. Both districts suffered in the Civil War; at least equally, it is fair to assume. Even so, the resultant disparity runs 2.26 to 1.[10]

Virginia's readmission to the Union was long delayed; see Act of April 10, 1869, c. 17, 16 Stat. 40; Act of Jan. 26, 1870, c. 10, 16 Stat. 62; Randall and Donald, *The Civil War and Reconstruction* (2d ed. 1961) 619, 620-621; but the population discrepancy in its senatorial districts was never assigned from any source as the reason for such delay.

Georgia. Article III, Sec. 2 of the Georgia Constitution of 1868 (2 Thorpe 822, 827-828) provided for 44 numbered senatorial districts, each composed of three contiguous counties. District 22, composed of Bibb, Monroe, and Pike

[10] Bland County, which was formed from parts of Giles, Wythe, and Tazewell Counties in 1861 (Va. Acts 1861, c. 23, p. 45), is not reflected in the 1860 census figures; but that circumstance does not affect the figure in the text.

Counties, had the most population—42,322 inhabitants, while District 15, comprising Montgomery, Telfair, and Irwin Counties, was the least populous, with only 7409 inhabitants. This is a discrepancy of 5.7 to 1.[11]

As we indicate in detail below, the struggle over Georgia's readmission was long and bitter, and she was the last of the former Confederate States to be restored to representation in Congress. But although her constitution was meticulously examined, see *United States* v. *Florida*, 363 U.S. 121, the distribution of seats in the Georgia Senate was never one of the reasons assigned for that long delay.

South Carolina. Article II, Sec. 8 of the South Carolina Constitution of 1868 (6 Thorpe 3281, 3286) provided for a senate in which Charleston County had two senators and every other county one senator. The 1860 census showed Charleston to have a population of 70,100, or 35,050 persons per senator; the high and low among the remaining counties were, respectively, Colleton with 41,916 and Horry with 7962. This comes to a differential of 5.2 to 1.[12]

While there was some discussion regarding the seating of one of South Carolina's new Senators, the debate dealt only with asserted irregularities in his election by the South Carolina legislature (Cong. Globe, 40th Cong., 2d sess., pp.

---

[11] Bartow County, a part of district 42, had been Cass County before the Civil War and appeared as such in the 1860 Census; the change of name was effected by Ga. Acts 1861, Act 97, p. 101. Certain minimal boundary changes, moving a lot or two at a time, were made in the boundaries of Telfair and Irwin Counties during the War. Ga. Laws 1862-63, No. 188, Sec. II, pp. 206-207 (two lots from Wilcox to Irwin); Ga. Laws 1864-65, No. 80, p. 81 (one lot from Telfair to Pulaski); Ga. Laws 1865-66, No. 67, p. 49 (slight readjustment of boundary between Irwin and Wilcox); Ga. Laws 1865-66, No. 68, p. 49 (one lot from Irwin to Worth).

[12] The 1860 Census shows as districts the areas redesignated in the 1868 constitution as counties. Also, Oconee County was formed by a division of Pickens District. See H.R. Ex. Doc. 291, 40th Cong., 2d sess., p. 11, notes. Neither factor varies what is said in the text.

4312, 4313-4320). South Carolina's new Congressmen were seated in completely routine fashion (pp. 4215-4216, 4254, 4499).

Texas. It may be of interest to examine the population differential among the senatorial districts of the Texas Constitution of 1868, Art. III, Sec. 11 of which (6 Thorpe 3591, 3595) purported to apportion both houses of its legislature according to population.

Article III, §§39-40 of the same instrument (6 Thorpe at 3597-3598) established 30 senatorial districts. The high in population was the first one, consisting of Chambers, Jefferson, Orange, Liberty, Hardon, Newton, Jasper, Tyler and Polk Counties; these showed in the 1860 census an aggregate population of 29,942 inhabitants. The low in population was the seventeenth senatorial district, comprising Burleson, Brazos, and Milam Counties, which together had only 13,634 persons in 1860. This is a ratio of 2.19 to 1.[13]

In Texas, as in Virginia and Mississippi, readmission was long delayed. Act of April 10, 1869, c. 17, 16 Stat. 40; Act of March 30, 1870, c. 39, 16 Stat. 80; Randall and Donald, *The Civil War and Reconstruction*, *supra*, at 621. But the reasons given were wholly independent of any asserted malapportionment in the Texas legislature alleged to violate the Equal Protection Clause.

Fourth. The suggestion of Sincock *et als.* (M/A 22) that the provisions of the new Southern constitutions were never considered by Congress is belied both by *United States* v. *Florida*, 363 U.S. 121, and by the underlying materials.

For one thing, the several constitutional provisions just analyzed were duly brought to the attention of Congress. H.R. Misc. Doc. 109, 40th Cong., 2d sess., pp. 25, 37

[13] Many Texas counties made no returns in 1860. But this circumstance does not affect the foregoing ratio.

(Florida); H.R. Ex. Doc. 281, 40th Cong., 2d sess., pp. 23, 25 (Louisiana); Sen. Ex. Doc. 54, 40th Cong., 2d sess., pp. 11-12 (Virginia); Sen. Ex. Doc. 57, 40th Cong., 2d sess., pp. 5-6 (Georgia); H.R. Ex. Doc. 291, 40th Cong., 2d sess., p. 11 (South Carolina); H.R. Misc. Doc. 82, 41st Cong., 2d sess., pp. 7-8 (Texas).

Nor was Congressional scrutiny of those provisions in any sense perfunctory, as the proviso to Section 1 of the Act of June 25, 1868, c. 70, 15 Stat. 73, bears witness:

> "* * * and the State of Georgia shall only be entitled and admitted to representation upon this further fundamental condition: that the first and third subdivisions of section seventeen of the fifth article of the constitution of said State, except the proviso to the first subdivision, shall be null and void, and that the general assembly of said State by solemn public act shall declare the assent of the State to the foregoing fundamental condition."

(For the text of the provisions that Congress required the State of Georgia to strike out of its constitution, see Sen. Ex. Doc. 57, 40th Cong., 2d sess., at pp. 14-15; and the footnotes in 2 Thorpe at 836-837.)

Thereafter, Georgia was required to ratify the Fifteenth Amendment also as a further prerequisite to readmission. Sec. 8 of the Act of Dec. 22, 1869, c. 3, 16 Stat. 59, 60.

Later when Virginia came up for readmission, Congress enacted the foregoing proviso (Act of Jan. 26, 1870, c. 10, 16 Stat. 62, 63):

> "That the State of Virginia is admitted to representation in Congress as one of the States of the Union upon the following fundamental conditions: First, That the Constitution of Virginia shall never be so amended or changed as to deprive any citizen or class of citizens of the United States of the right to vote who are entitled to vote by the Constitution herein recognized, except as a punishment for such

> crimes as are now felonies at common law, whereof they shall have been duly convicted under laws equally applicable to all the inhabitants of said State: *Provided*, That any alteration of said Constitution, prospective in its effects, may be made in regard to the time and place of residence of voters. Second, That it shall never be lawful for the said State to deprive any citizen of the United States, on account of his race, color, or previous condition of servitude, of the right to hold office under the constitution and laws of said State, or upon any such ground to require of him any other qualifications for office than such as are required of all other citizens. Third, That the constitution of Virginia shall never be so amended or changed as to deprive any citizen or class of citizens of the United States of the school rights and privileges secured by the constitution of said State."

Identical provisos were included in the readmission acts for Mississippi (Act of Feb. 23, 1870, c. 19, 16 Stat. 67, 68) and for Texas (Act of March 30, 1870, c. 39, 16 Stat. 80, 81).

We turn to Georgia's long-delayed readmission and the reasons therefor; it seems most convenient to quote from a standard text (J. G. Randall and David Donald, *The Civil War and Reconstruction* [2d ed. 1961] 619, 621-622):

> "Attention now turns to the four states in which reconstruction was retarded — Georgia, Mississippi, Virginia, and Texas. In general the reason for such retardation was the reluctance of the politically active elements in those states to fulfill the terms which Congress was imposing, a reluctance which taxed the ingenuity of the Radicals in inventing heroic devices to overcome the lack of harmony between actual conditions in the South and the measures which Congress had declared to be the law of the land.
>
> * * * * *
>
> "As to Georgia special action by Congress was found to be necessary. It will be recalled that it was one of the six states whose admission was provided

for by act of June 25, 1868. The state government was formed, the governor inaugurated, the legislature organized, and members of both houses of the Federal Congress chosen. All these steps were deemed satisfactory by the distinguished military governor, George G. Meade, who withdrew the military forces which had been occupying the state. Subsequently, however, certain Negro members who had been elected to the legislature were denied seats, while ex-Confederates were granted seats in opposition to the reconstruction laws and the fourteenth amendment. Congress therefore passed a special act for Georgia [Act of Dec. 22, 1869, c. 3, 16 Stat. 59], excluding from the legislature all who could not qualify under the amendment and prohibiting the exclusion of any member by reason of color. Severe penalties were imposed by this act upon anyone who should take oath falsely or hinder the taking of the oaths prescribed; and the President was authorized to use military force to execute its provisions. The reorganization of Georgia was effected under military direction, a board of officers being established to 'inquire into' the eligibility of disputed members. By order of the commanding general those found ineligible by the military board were 'prohibited' from taking part in the legislature, while as to those found eligible it was prescribed that no objections be made to their participation as members. [Citing Sen. Rep. 58, 41st Cong., 2d sess., pp. 6-8.] Proceedings in Congress concerning the enforcement of the fourteenth amendment in Georgia, the organization of a further military commission to inquire into the organization of the legislature, and like matters, are too complicated to be treated here. At length, after many parliamentary difficulties, a bill to admit the state was enacted into law (July 15, 1870). [Act of that date, c. 299, 16 Stat. 363.] Senators from Georgia took their seats on February 24, 1871, representatives having been previously admitted to the lower house."

We have examined the debates on the readmission of the former Confederate States, in the 40th Congress, as well as in the 41st Congress through the completion of

legislative action on the Act of July 15, 1870, which finally readmitted Georgia. They contain neither statement nor whisper nor intimation that area representation in a State senate, even in a former Confederate State's senate, in any sense even drew into question the scope of the Equal Protection Clause of the Fourteenth Amendment whose ratification and application had been imposed as indispensable prerequisites for readmission to the Union. They do show, as this Court noted in *United States* v. *Florida*, 363 U.S. 121, that the new Southern constitutions were rigidly scrutinized by Congress, and they further show that the Federal pattern for a legislature was discussed in the course of the debates.

In the interest of convenience, we have set forth in the Appendix to this brief, *infra;* pp. 112 *et seq.*, relevant excerpts from the debates on the readmission of the former Confederate States.

Fifth. And yet, while Congress thus indicated by way of action upon the State constitutions submitted to it its contemporaneous view that the Equal Protection Clause as a matter of constitutional interpretation did not prohibit area apportionment in State senates—and in this connection it is necessary to bear in mind that Section 5 of the Fourteenth Amendment specifically provided that "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article"—still when the contemporaneous sessions of Congress dealt with the same question as a matter of political desirability, they consistently provided that both legislative houses should be apportioned according to population.

Numerous territories were organized in the 1860's; in the organic act for each, it was regularly provided that both the upper house, the council, and the lower house, the house of representatives, should each be apportioned on the basis of population. We list those provisions here in chronological order.

Sec. 4 of the Act of Feb. 28, 1861, c. 59, 12 Stat. 172, 173 (Colorado Territory).

Sec. 4 of the Act of Mar. 2, 1861, c. 83, 12 Stat. 209, 210 (Nevada Territory).

Sec. 4 of the Act of Mar. 2, 1861, c. 86, 12 Stat. 239, 240 (Dakota Territory).

Act of Feb. 24, 1863, c. 56, 12 Stat. 664 (Arizona Territory; to be modeled after New Mexico, which had similarly prescribed that both houses of the territorial legislature be apportioned according to population, Sec. 5 of the Act of Sept. 9, 1850, c. 49, 9 Stat. 446, 448).

Sec. 4 of the Act of Mar. 3, 1863, c. 117, 12 Stat. 808, 809 (Idaho Territory).

Sec. 4 of the Act of May 26, 1864, c. 95, 13 Stat. 85, 87 (Montana Territory).

Sec. 4 of the Act of July 25, 1868, c. 235, 15 Stat. 178, 179 (Wyoming Territory).

The Wyoming provision, which became a law exactly one month after the Act readmitting South Carolina and Georgia with their area-apportioned State senates (*supra*, pp. 57, 58, 61-63), was as follows:

"SEC. 4. *And be it further enacted*, That the legislative power and authority of said Territory shall be vested in the governor and legislative assembly. The legislative assembly shall consist of a council and house of representatives. The council shall consist of nine members, which may be increased to thirteen, having the qualifications of voters as hereinafter prescribed, whose term of service shall continue two years. The house of representatives shall consist of thirteen members, which may be increased to twenty-seven, possessing the same qualifications as prescribed for members of the council, and whose term of service shall continue one year. An appor-

> tionment shall be made by the governor as nearly equal as practicable among the several counties or districts for the election of the council and house of representatives, giving to each section of the Territory representation in the ratio of their population, (excepting Indians not taxed,) as nearly as may be, and the members of the council and house of representatives shall reside in and be inhabitants of the districts for which they may be elected, respectively. Previous to the first election the governor shall cause a census or enumeration of the inhabitants of the several counties or districts of the Territory to be taken * * *."

The foregoing was the standard provision, enacted *verbatim* or nearly so in all the organic acts we have heretofore cited.[14]

Moreover, Congress was astute to provide for prompt reapportionment in the organized Territories. See the Act of June 20, 1864, c. 141, 13 Stat. 142 (governor authorized to reapportion both houses of the Idaho territorial legislature); Act of Feb. 21, 1871, c. 64, 16 Stat. 429 (same, in respect of legislature of Colorado Territory).

Indeed, the strongest expression of Congressional intention in respect of legislative apportionment in territorial legislatures is the Act of Feb. 21, 1871, c. 65, 16 Stat. 429, "An Act to repeal an Act of the Legislature of Wyoming Territory apportioning said Territory for Members of the

---

[14] As a matter of interest, the same stock provision appeared in all the other acts organizing territories, from the close of the Mexican War through the 1850's:

Sec. 4 of the Act of Aug. 14, 1848, c. 177, 9 Stat. 323, 324 (Oregon Territory); Sec. 4 of the Act of Mar. 3, 1849, c. 121, 9 Stat. 403, 404 (Minnesota Territory); Sec. 4 of the Act of Sept. 9, 1850, c. 51, 9 Stat. 453, 454 (Utah Territory); Sec. 4 of the Act of March 2, 1853, c. 90, 10 Stat. 172, 173 (Washington Territory); Sec. 4 of the Act of May 30, 1854, c. 59, 10 Stat. 277, 278 (Nebraska Territory); Sec. 22 of the same Act, 10 Stat. at 284 (Kansas Territory).

Council and House of Representatives of the Territorial Legislature." The territorial act was "disapproved and repealed," and the Governor of the Territory was directed to effect the reapportionment.

Or, otherwise stated, while contemporaneous sessions of Congress as a matter of desirability enforced the pattern of population-apportioned upper legislative houses in the Territories, in areas that knew no traditions save those of the deer, the antelope, the buffalo, and of tribal Indians in varying stages of development, it never considered such a pattern to be a matter of constitutional compulsion for the former Confederate States, communities each of which had a substantial background of political development, and which were readmitted to the Union on the repeatedly imposed and strictly enforced condition of complete compliance with all the provisions of the Fourteenth Amendment.

Sixth. From the foregoing record of what Congress did and did not do, it is apparent that, by admitting the formerly seceded States with their new constitutions that provided for area-apportioned senates, the Congresses nearest in time to the adoption, ratification, and initial enforcement of the Fourteenth Amendment interpreted the Equal Protection Clause as not "to prevent the making of social experiments that an important part of the community desires, in the insulated chambers afforded by the several States" (Holmes, J., in *Truax* v. *Corrigan*, 257 U.S. 312, 344), where such social experiments involved a State legislature constructed on the Federal pattern.

We have already, *supra*, pp. 63-67, pointed out how closely Congress scrutinized the new constitutions of the former Confederate States. Very plainly, therefore, if the Congresses that imposed such requirements had considered Georgia's plan of giving one senator to every three counties regardless of population to be violative of the Equal Protection Clause, or had similarly regarded as

contravening that Clause South Carolina's scheme of one senator for each county (with but a single exception), it would necessarily have insisted that those provisions, also, be expunged or altered. Having regard to the temper of the times, it cannot be supposed for one moment that, if the Reconstruction Congresses had ever considered area representation in one house of a State legislature to constitute a denial of the equal protection of the laws, they would ever have readmitted South Carolina, which had been first to secede and first to fire on the flag, or Georgia, which for so long proved stubborn, obdurate, and "unreconstructed." The foregoing view, we submit, is amply supported by the rationale of *United States* v. *Florida*, 363 U.S. 121.

From this it necessarily follows that the statement in *MacDougall* v. *Green*, 335 U.S. 281, 283, that "To assume that political power is a function exclusively of numbers is to disregard the practicalities of government," correctly reflects the original understanding and interpretation of the Equal Protection Clause; and that the contrary view of the court below, the holding that this Clause requires both houses of a State legislature to be apportioned according to population, represents a revelation never vouchsafed to the contemporaries of the enactment, ratification, and initial implementation of the Fourteenth Amendment.

We close this point as we began it: No court in any of the controversies involving apportionment of a State senate apparently has ever looked to contemporaneous Congressional interpretation of the Equal Protection Clause as shown by the readmission of the former Confederate States; no commentator, to our knowledge, has examined this field; and the brief filed on behalf of the United States, which relies on the comments of Jefferson and Madison, necessarily stops with their deaths in 1826 and 1836 respectively, and undertakes to argue the meaning of the Equal Protection Clause without any examination of what was said or done about that clause during the most critical years, 1866 through 1870.

B. The contrary view of the court below involves two unacceptable incongruities, first that the permanent guaranty in the Constitution of the United States of two senators to every State violates the rights under the same Constitution of the people of the more populous States, second that the principle of checks and balances written into the Constitution of the United States is unconstitutional under the same instrument because it frustrates the immediate attainment of whatever objectives a majority of the people may desire at any given time

First. As has been seen, the majority of the court below held that Delaware could not constitutionally model its legislature on the Federal pattern, whereby New Castle County, with 69% of the State's 1960 population, would elect one-third of the Senate, while Kent and Sussex Counties, with approximately 31% of the population, would elect two-thirds of the Senate (J.S. App. A43).

The brief of the United States as *amicus curiae* in No. 29 also lays down broad principles allegedly founded on the Constitution. It speaks of (U.S. Br. *A.C.* 23) "the democratic ideals of equality and majority rule," of (*id.* 26) "the principles of popular representation and majority rule" and of (*id.* 44) "the primacy of the principles of voting equality and majority rule." It asserts (*id.* 49) that "the principles of voter equality and majority rule are too vital a part of our constitutional philosophy to permit States thus to submerge them in the interest of recognizing political subdivisions," and (*id.* 60) that "Our entire history teaches the ideals of voter equality and majority rule."

We think that a comprehensive answer to all of the foregoing views is found in Judge Layton's dissent below. (J.S. App. A64-A66 [footnote omitted]):

> "With deference, I can find nothing constitutionally wrong in the make up of a State Legislature composed of a Lower House whose members are elected upon a strict population basis and an Upper House whose

members are elected in equal numbers from each County. This is the way our Federal Congress is constituted. True, the analogy between a State Legislature and the Federal Congress is not exact. For one thing, the states are sovereign while the counties are not. More importantly, under the 1963 amendment, an invidious discrimination could well be found to exist on an intra-county basis in the composition of the Senate which would necessitate a redistricting. For instance, the 4th Senatorial District of New Castle County with a population of 64,000 has one senator, while the 7th Senatorial District of the same county has 4,000. Nevertheless, while not exact, the broad analogy is clear and to my mind it is incongruous to hold that a state legislature patterned upon lines precisely similar to those of the federal system is unconstitutional because offensive to the Equal Protection Clause of the Federal Constitution.

* * * * *

"As a practical matter, no more glaring example of 'invidious discrimination' can be found than in general elections where a voter in Nevada, having a population of approximately 285,000, casts a vote for a United States Senator while at the same time a voter in the State of New York, having a population of 16,750,000, casts his vote for a United States Senator.

"Since the so-called federal system has withstood 175 years of stress and strain in the national political arena, I can see no valid reason for interfering with the composition of a State Legislature modeled exactly on it."

The United States also, throughout its several briefs *amicus* in the related State apportionment cases, stresses the circumstance that a minority of the voters in the several States there involved can elect a majority of each State senate. E.g. (U.S. Br. *A.C.*, No. 29, pp. 47-48), "In Maryland, as a result of the apportionment of equal votes to each county (with additional senators for Baltimore City), one-seventh of the people of Maryland elect a

majority in the State Senate." Again (U.S. Br. *A.C.*, No. 20, p. 35), "Under the new apportionment, 38 percent of the citizens [of New York] will elect a majority of the Senate * * *." Further (U.S. Br. *A.C.*, No. 69, p. 47), "Under the 1962 statute, 41.1 percent of the population [of Virginia] elects a majority of the Senate * * *." Finally (U.S. Br. *A.C.*, Nos. 23, 27, 41, p. 41), "A majority of the senators would come from districts containing 27.6 percent of the people [of Alabama]."

The fact of the matter is that the built-in provisions of the Federal system produce far greater disparities.

The Constitution provides (Art. II, Sec 3; Art. XVII) that "The Senate of the United States shall be composed of two Senators from each State," and further provides (Art. V) "that no State, without its Consent, shall be deprived of it's equal Suffrage in the Senate." These clauses guarantee for all time the Federal adjustment between large and small states—the major problem in the Convention that informed commenators have termed "The Great Compromise" (Farrand, *The Framing of the Constitution* (1913) c. VII; Charles Warren, *The Making of the Constitution* (1937 ed.) pt. Two, c. V).

Under this Federal principle, under this Federal system, a majority of the Senate is elected by a very small minority of the population.

Today there are 50 States, so that 51 senators constitute a majority of the Senate. That majority can be composed of the two Senators from each of the 25 least populous States plus one Senator from the next least populous.

In 1960, the population of the 25 least populous States aggregated 27,985,146. Half of the population of the 26th least populous State, was 1,267,617. Otherwise stated, 29,252,763 people can elect a majority of the Senate. This is 16.31% of the entire 1960 population of 179,323,175.

Thus less than one-sixth of the people of the United States elect a majority of the Senate of the United States.[15]

Very plainly, this is on a par with the Maryland Senate disparity of which the brief of the United States complains, far less than the disparities in New York, Virginia, and Alabama which that brief also challenges, and substantially the same as the condition in Delaware that the court below struck down as invidiously discriminatory.

The view held by the presiding judge of the court below for the concept of Federalism may be judged by the circumstance that in a revealing witticism he equated "The Great Compromise" of the Federal Convention with the invention of the queue (J.S. App. A44, n. 17).

More significantly, the arithmetical analysis of the operation of Federalism in the Senate of United States under the 1960 census demonstrates that the much vaunted principles of voting equality and majority rule evoked by the brief of the United States are not only no part of the philosophy of our Constitution but are in fact rejected by it—and guaranted against ever being adopted.

Indeed, to approve the views of the court below in respect of the allegedly invidious discrimination produced by the Federal pattern, or to espouse as a constitutional principle the views advanced here on behalf of the United States, would involve this incongruity, that the provision of the United States Constitution forever protected against alteration, which guarantees to every State however small

[15] The least populous States in 1960, in ascending order of population, were (1) Alaska, (2) Nevada, (3) Wyoming, (4) Vermont, (5) Delaware, (6) New Hampshire, (7) North Dakota, (8) Hawaii, (9) Idaho, (10) Montana, (11) South Dakota, (12) Rhode Island, (13) Utah, (14) New Mexico, (15) Maine, (16) Arizona, (17) Nebraska, (18) Colorado, (19) Oregon, (20) Arkansas, (21) West Virginia, (22) Mississippi, (23) Kansas, (24) Oklahoma, (25) South Carolina, and (26) Connecticut.

equal representation in the Senate of the United States, simultaneously constitutes a denial of the equal protection of the laws to the people of the most populous States. And this incongruity is underscored by the circumstance that a denial of equal protection may, when the discrimination is sufficiently unjustifiable, constitute a denial of due process as well. *Bolling* v. *Sharpe*, 347 U.S. 497.

It necessarily follows that the views of the court below, here supported by the United States as *amicus curiae* in the other State reapportionment cases, involve the unacceptable paradox that the United States Constitution carries within itself the forever imbedded cancer of unconstitutional discrimination.

Second. Unchecked and unrestrained majority rule is not the pattern of the Constitution of the United States; that instrument was fashioned on the view that the principle of checks and balances constituted a wiser pattern for what the Great Chief Justice on a memorable occasion called "a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs" (*M'Culloch* v. *Maryland*, 4 Wheat. 316, 415).

A system of checks and balances places a significant brake on unrestrained majority rule. Simply to mention some of the more obvious and universally familiar features of the Constitution of the United States, a Senate representing a minority of the population can refuse to pass a measure overwhelmingly adopted by a House of Representatives apportioned according to population; a single individual, indirectly elected—the President—can veto a measure passed by both houses of Congress; and a bare majority of this Court can and frequently does declare invalid and refuse enforcement to a measure duly enacted by large majorities of both houses of Congress and enthusiastically approved by the President.

These are fundamentals, but it is well to recall them in the face of the expressions now being pressed on the Court, already quoted, about "the democratic ideals of equality and majority rule," and "the primacy of the principles of voter equality and majority rule." The fact of the matter is that those principles are demonstrably not the principles on which the Constitution of the United States was constructed.

In this connection, we think it well to remember that a pure example of instantaneous response to the will of a momentary majority in a particular community that is unchecked by any restraints whatever is a lynching.

Mr. Justice Holmes once said (*Collected Legal Papers* (1921) 291, 292-293) that "at this time we need education in the obvious more than investigation of the obscure." It seems appropriate, therefore, to point out what indeed we may be in some danger of forgetting, that the protection of minority rights and the enforcement of civilized processes of law, both characteristic and pervasive features of what we proudly regard as the American way of life, are such only because the Constitution under which we live is based upon checks and balances. Contrariwise, minorities have no enforceable rights in any society constructed on the theory of undiluted majoritarianism.

Moreover, we cannot forbear to remark that what is so paradoxical and so incongruous about the position of Sincock *et als.* here, about the holding below, and about the arguments addressed to this Court by the United States, is that each invokes the checks-and-balance machinery of judicial review in order to remove checks and balances from State governments in the name of asserted (U.S. Br. *A.C.*, No. 29, p. 30) "fundamental ideals of American political life."

We are confident that this Court will not support the inescapable constitutional incongruities that affirmance of the judgment below will necessarily involve.

C. This Court's experience with erecting economic philosophies into constitutional absolutes under the Due Process Clause stands as a solemn warning against now erecting political philosophies into similar constitutional absolutes under the Equal Protection Clause

While, for the reasons already set forth, we think that the checks-and-balances contentions of New Jersey and 14 other States in their brief *amicus* in No. 29 rest on distinctly sounder historical and constitutional grounds than do the exhortations advanced on the behalf of the United States in that case and in the other causes involving State apportionment (Nos. 20, 23, 27, 29, 41, and 69), we are convinced that the resultant contest between competing political philosophies is not one appropriate for resolution here.

In our view, neither the question whether the principle of unrestrained majority rule is better or wiser than the system of checks and balances, nor the question whether State governments can be distinguished from the Federal government on grounds going to the facts underlying the formation of each (U.S. Br. *A.C.*, No. 29, pp. 73-82), are any more appropriate for judicial resolution on the footing of constitutional interpretation than the question whether it is socially beneficial to regulate hours of labor (cf. *Lochner* v. *New York*, 198 U.S. 45, with *Muller* v. *Oregon*, 208 U.S. 412), whether it is desirable to fix minimum wages (cf. *Adkins* v. *Children's Hospital*, 261 U.S. 525, with *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379), whether it is wise to prohibit child labor (cf. *Hammer* v. *Dagenhart*, 247 U.S. 251, with *United States* v. *Darby*, 312 U.S. 100), or whether it is in the public interest to regulate optometrists (*Williamson* v. *Lee Optical Co.*, 348 U.S. 483) or to prohibit altogether the practice of naturopathy (*Dantzler* v. *Callison*, 352 U.S. 939; *Hitchcock* v. *Collenberg*, 353 U.S. 919).

Only last Term this Court reviewed at length the basic fallacy underlying the decisions of another age that

erected judgments regarding social and economic desirability into immutable constitutional principles. The quotation that follows is from *Ferguson* v. *Skrupa*, 372 U.S. 726, 729-732 (footnotes omitted).

> "Under the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation. There was a time when the Due Process Clause was used by this Court to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy. In this manner the Due Process Clause was used, for example, to nullify laws prescribing maximum hours for work in bakeries, *Lochner* v. *New York*, 198 U.S. 45 (1905), outlawing "yellow dog" contracts, *Coppage* v. *Kansas*, 236 U.S. 1 (1915), setting minimum wages for women, *Adkins* v. *Children's Hospital*, 261 U.S. 525 (1923), and fixing the weight of loaves of bread, *Jay Burns Baking Co.* v. *Bryan*, 264 U.S. 504 (1924). This intrusion by the judiciary into the realm of legislative value judgments was strongly objected to at the time, particularly by Mr. Justice Holmes and Mr. Justice Brandeis. Dissenting from the Court's invalidating a state statute which regulated the resale price of theatre and other tickets, Mr. Justice Holmes said,
>
> > 'I think the proper course is to recognize that a state legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the State, and that Courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular Court may happen to entertain.'
>
> And in an earlier case he had emphasized that, 'The criterion of constitutionality is not whether we believe the law to be for the public good.'
>
> "The doctrine that prevailed in *Lochner*, *Coppage*, *Adkins*, *Burns*, and like cases—that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded. We have returned to the

original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws. As this Court stated in a unanimous opinion in 1941, 'We are not concerned . . . with the wisdom, need, or appropriateness of the legislation.' Legislative bodies have broad scope to experiment with economic problems, and this Court does not sit to 'subject the State to an intolerable supervision hostile to the basic principles of our Government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to secure.' It is now settled that States 'have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law.'

"In the face of our abandonment of the use of the 'vague contours' of the Due Process Clause to nullify laws which a majority of the Court believed to be economically unwise, reliance on *Adams* v. *Tanner* is as mistaken as would be adherence to *Adkins* v. *Children's Hospital*, overruled by *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379 (1937). Not only has the philosophy of *Adams* been abandoned, but also this Court almost 15 years ago expressly pointed to another opinion of this Court as having 'clearly undermined' *Adams*. We conclude that the Kansas Legislature was free to decide for itself that legislation was needed to deal with the business of debt adjusting. Unquestionably, there are arguments showing that the business of debt adjusting has social utility, but such arguments are properly addressed to the legislature, not to us. We refuse to sit as a 'superlegislature to weigh the wisdom of legislation,' and we emphatically refuse to go back to the time when courts used the Due Process Clause 'to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.' Nor are we able or willing to draw lines by calling a law 'prohibitory' or 'regulatory.' Whether the legislature takes for its textbook Adam Smith,

> Herbert Spencer, Lord Keynes, or some other is no concern of ours. The Kansas debt adjusting statute may be wise or unwise. But relief, if any be needed, lies not with us but with the body constituted to pass laws for the State of Kansas."

There is, happily, no present danger of a reversion to the earlier standards of construing the Due Process Clause on the basis of "our own personal economic predilections" (Stone, J. in *Morehead* v. *Tipaldo*, 298 U.S. 587, 633).

But there is grave danger in the position of those now urging the Court to write their political theories into the Equal Protection Clause in order to strike down systems of State government simply because those duplicate the Federal pattern and embody the Federal Convention's concepts of checks and balances. Indeed, the danger now faced is a more serious one, because the doctrine asserted by the district court in this case and espoused by the United States in the several related State apportionment cases would mark a sharp and sudden break with the past, would be a drastic revision of basic constitutional principles; and would constitute the most blatant kind of constitutional revision by judicial fiat.

Indefensible as were the rigid and doctrinaire interpretations of the Due Process Clause that reached their apogee in the universally criticized and short-lived case of *Morehead* v. *Tipaldo*, 298 U.S. 587, at least they were reached gradually and on a case-to-case basis, so that even the most extreme Due Process decisions were the product of a scalpel and not of a meat-axe.

As early as *Davidson* v. *New Orleans*, 96 U.S. 97, 104, the Court said of cases arising under the Fourteenth Amendment that "there is wisdom, we think, in the ascertaining of the intent and application of such an important phrase in the Federal Constitution, by the gradual process of judicial inclusion and exclusion, as the cases presented for

decision shall require, with the reasoning on which such decisions may be founded."

Similarly, in his classic dissent in *Southern Pac. Co.* v. *Jensen*, 244 U.S. 205, 221, Mr. Justice Holmes said, "I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions. A common-law judge could not say, 'I think the doctrine of consideration a bit of historical nonsense and shall not enforce it in my court.'"

Even when the case-to-case approach led to unsupportable results, at least the constitutional process had been one of slow accretion. Compare Jackson, J., concurring in *Douglas* v. *Jeannette*, 319 U.S. 157, 181: "This Court is forever adding new stories to the temples of constitutional law, and the temples have a way of collapsing when one story too many is added. So it was with liberty of contract, which was discredited by being overdone."

Here, however, it is proposed, in one fell swoop, without the slightest preliminary, as a matter of first impression, and without any history of prior adjudication, that this Court adopt an interpretation of the Equal Protection Clause in respect of the permissible design of State legislatures that will reverse with a single stroke of the pen the diametrically opposite interpretation placed on that Clause by the Congresses nearest in time to its drafting, adoption, ratification—and enforcement.

We have shown, *supra* Point IIA, how the Reconstruction Congresses, after imposing as a condition to the readmission of the formerly seceded States their prior ratification of the Fourteenth Amendment, and after scrutinizing most carefully the new constitutions those States submitted in compliance with that condition, readmitted two former Confederate States whose constitutions on their face adopted the Federal pattern of area repre-

sentation in one house of the legislature, and whose senates in consequence reflected population disparities of between 5 and 6 to 1.

The court below held, and Sincock *et als.* and the United States urge that this Court now decide, 95 years later, that the Reconstruction Congresses did not understand their own handiwork, and that, without any intervening judicial construction, the 1868 Congressional interpretation be squarely rejected, with the result that in 1963 Delaware is held to have practiced invidious discrimination against its citizens when, following the procedures prescribed by its fundamental law, it refashioned its legislature on the Federal pattern.

No more bold or bald proposition has ever been submitted to this Court. For the arguments of Sincock *et als.* and of the United States ask that the Constitution of the United States be amended, not in the manner prescribed by Article V, not in consequence of a long series of decisions that have demonstrated the infirmities of earlier decisions, cf. *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 and *Graves* v. *O'Keefe*, 306 U.S. 466, but simply by fiat—to accord with their newly vouchsafed revelations as to what they would like the Constitution to mean as an original proposition if they were themselves to fashion it today.

But it is suggested by Sincock *et als.* that the district court here (M/A 20) "had before it the debasement of the Civil Rights of the plaintiffs"—capitalization in the original—and, on behalf of the United States, that (U.S. Br. *A.C.*, No. 29, p. 66) "where civil liberties are involved, far more than a merely intelligible classification is required. * * * In dealing with personal liberty the legislature may not draw distinctions that would support differences in taxation or social legislation."

Thus the argument of the United States (*id.*, pp. 65-70) seeks to narrow substantially, in this case as well as in the

related ones from other States, the normal range of classifications allowable under the Equal Protection Clause.

There are several answers to these contentions.

First. The United States says (*id.* p. 69):

> "In *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152, note 4, Mr. Justice Stone raised the question 'whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation.'"

Not only is this a misquotation—the original sentence begins with the words, "It is unnecessary to consider now whether legislation which restricts," &c.—but the much-discussed *Carolene* footnote, which had a checkered career not necessary to detail at this juncture, is now no longer law. Currently no provision of the Constitution enjoys preferences over any other. See *Ullmann* v. *United States*, 350 U.S. 422, 428-429, where this Court said (footnote omitted):

> 'As no constitutional guarantee enjoys preference, so none should suffer subordination or deletion. It is appropriate to read the conviction expressed in a memorable address by Senator Albert J. Beveridge to the American Bar Association in 1920, a time when there was also manifested impatience with some of the restrictions of the Constitution in the presumed interest of security. His appeal was to the Constitution—to the whole Constitution, not to a mutilating selection of those parts only which for the moment find favor. To view a particular provision of the Bill of Rights with disfavor inevitably results in a constricted application of it. This is to disrespect the Constitution.'"

Second. The cases cited on behalf of the United States are hardly comparable in any sense to the ones now before the Court. E.g., *Skinner* v. *Oklahoma*, 316 U.S. 535, where

the distinction between larceny and embezzlement was held insufficient to justify sterilizing an individual who had committed one offense but not the other; *Griffin* v. *Illinois*, 351 U.S. 12, holding that poverty is not a sufficient reason for denying a transcript to an indigent appellant; *Oyama* v. *California*, 332 U.S. 633, and *Takahashi* v. *Fish and Game Commission*, 334 U.S. 410, where thinly veiled discriminations based on Oriental ancestry were struck down; and *Yick Wo* v. *Hopkins*, 118 U.S. 356, where the ordinance baldly prohibited the licensing of all laundries operated by Chinese nationals.

These decisions are hardly authority, even when they involve dicta that "the political franchise of voting * * * is regarded as a fundamental political right, because preservative of all rights" (*Yick Wo* v. *Hopkins*, 118 U.S. at 370), for the proposition that a particular pattern of representation is violative of the Equal Protection Clause unless it conforms to the current ideals of Sincock *et als.* After all, the Delaware election officials who are appellants in this case have in no sense deprived Sincock *et als.* of the right to vote. The present appellees are entirely free to vote in the 1964 general election, as indeed they were free to vote in the 1962 and earlier general elections. What is involved is the question whether the Equal Protection Clause is to be rewritten simply because their votes may carry a lesser weight in the Delaware General Assembly; or, more specifically phrased, whether Sincock *et als.* have been denied the equal protection of the laws because their votes have in the composition of the Delaware Senate the weight of that of a citizen of California rather than of one from Alaska in the composition of the United States Senate.

Very plainly, the cases cited by the United States shed no light whatever on the resolution of that question.

Third. The basic fallacy in the effort of the United States to narrow the normal application of the Equal

Protection Clause in these cases is that by verbalizing the issue into semantically appealing catchwords such as "personal liberty and political right" (U.S. Br. *AC.*, No. 29, p. 66), "civil liberties" (*ibid.*), "equality of political rights" (*id.* p. 68), "the right to fair participation in one's own government" (*ibid.*), and "the right to equal representation" (*id.*, p. 69), the real problem is distorted and concealed.

That problem is whether a State of the Union is to be limited in its choice of an organic structure of government by the "vague contours" of the Equal Protection Clause (cf. Holmes, J., in *Adkins* v. *Children's Hospital*, 261 U.S. 525, 568) so as "to prevent the making of social experiments that an important part of the community desires, in the insulated chambers afforded by the several States" (cf. Holmes, J., in *Truax* v. *Corrigan*, 257 U.S. 312, 344).

A State of the Union as such can hardly be said to have a vital, fundamental interest in sterilizing particular kinds of criminals (*Skinner* v. *Oklahoma*, 316 U.S. 535) or in denying indigents free transcripts on appeal (*Griffin* v. *Illinois*, 351 U.S. 12) or in denying economic equality to particular classes of aliens (*Oyama* v. *California*, 332 U.S. 633; *Takahashi* v. *Fish and Game Commission*, 334 U.S. 410; *Yick Wo* v. *Hopkins*, 118 U.S. 356). But a State of the Union has a large and mighty interest in determining how its own government shall be constituted and constructed. Such an interest cannot properly be minimized by attaching the currently popular catchwords of liberties and rights to the contentions of individuals in that State whose preference is for another determination of its organic structure.

It did not need the acknowledgment of error permeating the opinion in *Ferguson* v. *Skrupa*, 372 U.S. 726, to warn against the unwisdom of fashioning particular political philosophies into rigid and immutable interpretations of

the Constitution. Fifteen years before *Ferguson* v. *Skrupa*, the Court prophetically declared in *MacDougall* v. *Green*, 335 U.S. 281, 284:

> "It would be strange indeed, and doctrinaire, for this Court, applying such broad constitutional concepts as due process and equal protection of the laws, to deny a State the power to assure a proper diffusion of political initiative as between its thinly populated counties and those having concentrated masses, in view of the fact that the latter have practical opportunities for exerting their political weight at the polls not available to the former. The Constitution—a practical instrument of government—makes no such demands on the States."

Just as the Court does not now strike down under the Due Process Clause laws that may be either unwise or incompatible with a particular economic or social philosophy, so long as such laws do not run afoul of some specific constitutional prohibition, so the Court should not now strike down under the Equal Protection Clause State constitutional provisions for apportionment simply because those may be either unwise or incompatible with a particular political philosophy, so long as such State constitutional provisions do not run afoul of some specific Federal constitutional prohibition.

Surely the generalized command that no State shall "deny to any person within its jurisdiction the equal protection of the laws" does not of its own force prohibit a State from fashioning its legislature on the Federal model. And surely it would be more than doctrinaire, it would be purely arbitrary, now suddenly to write into the Equal Protection Clause an interpretation that is diametrically opposed to the contemporaneous construction placed upon it by the Congresses nearest in time to the drafting and adoption of that Clause, when submission thereto was imposed as a condition precedent to the readmission of the former Confederate States.

III. THE APPORTIONMENT OF THE DELAWARE GENERAL ASSEMBLY EFFECTED BY THE 1963 AMENDMENT TO THE DELAWARE CONSTITUTION IS ENTIRELY CONSISTENT WITH WELL-SETTLED INTERPRETATIONS OF THE EQUAL PROTECTION CLAUSE

A. The Equal Protection Clause does not strike down classifications that have a reasonable basis even though a court as an original proposition might be able to devise other classifications that may seem more logical or symmetrical

It seems worthwhile, in view of the opinion of the district court on the scope of the Equal Protection Clause and the arguments now made here in support of that opinion, to consider at greater length than might otherwise be necessary just what this Court has said concerning the proper application of that Clause. For the importance of this and of the related cases recall the comment made in *Sanitary District* v. *United States*, 266 U.S. 405, 425: "But cost and importance, while they add to the solemnity of our duty, do not increase the difficulty of decision except as they induce argument upon matters that, with less mighty interests, no one would venture to dispute."

Here are the Court's most recent pronouncements on the scope and proper interpretation of the Equal Protection Clause:

(1) *McGowan* v. *Maryland*, 366 U.S. 420, 425-426:

> "Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."

(2) *Morey* v. *Doud*, 354 U.S. 457, 463-464:

"In determining the constitutionality of the Act's application to appellees in the light of its exception of American Express money orders, we start with the established proposition that the 'prohibition of the Equal Protection Clause goes no further than the invidious discrimination.' *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 489. The rules for testing a discrimination have been summarized as follows:

> '1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.' *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 78-79.

To these rules we add the caution that 'Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.' *Louisville Gas Co.* v. *Coleman*, 277 U.S. 32, 37-38; *Hartford Co.* v. *Harrison*, 301 U.S. 459, 462."

(3) *Goesaert* v. *Cleary*, 335 U.S. 464, 466:

"The Constitution in enjoining the equal protection of the laws upon States precludes irrational discrimination as between persons or groups of persons in the incidence of a law. But the Constitution does not re-

quire situations 'which are different in fact or opinion to be treated in law as though they were the same.' *Tigner* v. *Texas*, 310 U.S. 141, 147.'

With those settled standards before us as a yardstick, we turn to the basic pattern of apportionment for the General Assembly effected by the 1897 Delaware Constitution (J.S. App. A71-A75) as amended in 1963 (J.S. App. A77-A81); the latter became effective on January 17, 1963. *Opinion of the Justices*, 190 A. 2d 519.

That pattern followed the Federal system of a Senate in which each constituent of the political union is equally represented, and a House of Representatives apportioned according to population. Specifically, each County was assigned seven senators, just as each State of the Union is entitled to two United States Senators, while the changed population of the State since 1897 was recognized by increasing the number of Representatives in such a manner that there will now be 25 instead of 15 to be elected by New Castle County. The City of Wilmington will now have 7 Representatives instead of 5, while rural New Castle will have 18 representatives instead of 10 as formerly provided.

Passing for the moment the details of this pattern, which we discuss fully below, we submit that the reapportionment effected by the 1963 amendment has a perfectly rational basis, is patterned on institutions that are the very warp and woof of American life, and reflects the fact that, just as the United States was formed by a union of States, so Delaware was formed by a union of Counties.

Still restricting ourselves to the major features of the 1963 reapportionment, it is true that the two lower counties, Kent and Sussex, have a greater proportionate representation in the Delaware Senate than does New Castle County. Similarly, Alaska and Nevada have a greater proportionate representation in the United States Senate than do New York or California. But surely none but emotional doc-

trinaires would say that the latter system lacks a rational basis in consequence of that fact.

Indeed, the disproportion between New York and Alaska in the 1960 census, which was on the order of 74 to 1 (16,782,304 to 226,167),[16] is infinitely greater than the disproportion between the three Delaware counties in the same enumeration.

New Castle then had 307,446 people, as against 73,195 for Sussex County and 65,651 for Kent County. These proportions are, respectively, 4.2 to 1 and 4.68 to 1—which is far less than the 5.7 to 1 and 5.2 to 1 in Georgia and South Carolina respectively that satisfied the Reconstruction Congress in 1868.

We are therefore constrained, as we examine the basic contentions of opposing counsel in this matter, to repeat the classic sentence with which Mr. Justice Holmes opened his dissent in *Adair* v. *United States*, 208 U.S. 161, 190: "I also think that the statute is constitutional, and, but for the decision of my brethren, I should have felt pretty clear about it."

B. The 1963 amendment to the Delaware Constitution reapportioning the Delaware House of Representatives has a reasonable basis, reflects a good faith effort to comply with Baker v. Carr, provides for periodic reapportionment as the population of the State shifts over the years, and contains an effective enforcement provision

As has been shown, the 1963 Reapportionment Amendment (J.S. App. A77-A81) resulted in the addition of 10 Representatives to New Castle County, two additional being assigned to the City of Wilmington and the remaining eight to rural New Castle County.

---

[16] We are aware that there have been changes since 1960, and that California is now the most populous State. See "Nevada Grows Most, Arizona is Next," *The Sunday Star*, Oct. 20, 1963, p. C-2. But these shifts do not vary the argument in the text.

Existing representative districts were retained, the basis for an increase being as follows (Section 2A, J.S. App. A79):

> "Each existing Representative District as set forth in Section 2 of this Article, with a population residing therein in excess of 15,000, as shown by the last official federal decennial census shall be entitled to one additional Representative for each additional 15,000 population or major fraction thereof residing within the District."

The representative districts to be subdivided are to be redistricted by a Redistricting Commission, set up as therein prescribed (J.S. App. A80), with a provision (J.S. App. A81) that "Any qualified voter may apply to the Superior Court to compel the Governor, by mandamus or otherwise, to perform the redistricting and reapportionment duties or to correct any error in redistricting and reapportioning. * * * On appeal, the cause shall be reviewed by the Supreme Court upon the law and the facts."

Once the redistricting is effected, the Governor must proclaim the plan (J.S. App. A80), and this is what he did here to effectuate the 1963 amendment (Del. App. 5a-10a).

Following the 1970 and each successive census (J.S. App. A80), "the new Representative Districts created pursuant to this Section [Section 2A of the 1963 amendment] shall be abolished and the Representative Districts set forth in Section 2 of this Article shall again be re-divided as set forth herein."

Thus the 1963 apportionment is not inflexible. It looks to the future; it provides for reapportionment after each decennial census; and it provides as well a prompt and effective remedy for its enforcement.

The chairman of the Bipartisan Reapportionment Committee that drafted the 1963 amendment testified that the Committee decided on 15,000 or a major fraction thereof

as the limit of each Representative District on the basis of trends in population growth, the small size of the State, the available accommodations for the General Assembly, and in order to give a voice to all segments of society and to all practices and customs (Del. App. 73a-75a). And the Committee decided to leave one Representative to each existing Representative District on the basis that, considering population trends, all Districts would soon grow to reach a major fraction of 15,000 (Del. App. 74a-75a, 91a-92a).

The minutes of the Committee (Def. Ex. 1, Del. App. 100a-339a) reflect a conscientious effort to effect a reapportionment that would comply with the rule of *Baker* v. *Carr*, 369 U.S. 186—at least to the extent that the Committee members were able to ascertain the precise scope of that decision. The minutes also reflect the concern of the Committee over preparing an amendment that would muster the constitutionally required two-thirds majority in both houses (Del. Const. 1897, Art. XVI, Sec. 1; J.S. App. A76), on the view that political action is the art of the possible; and the minutes reflect as well the Committee's concern over the shortness of time available to them in view of the attitude of the district court in the present case (pp. 6-8, 10-11, *supra;* Point IV, *infra*).

Examination of the chairman's testimony (Del. App. 51a-97a) and of the Committee's minutes (Del. App. 100a-339a) will, we think, convey to any dispassionate reader assurance that the 1963 amendment constitutes an effort in the best of faith under very substantial difficulties to reapportion pursuant to the mandate of *Baker* v. *Carr;* that it contains integral provisions for future modifications and for both present and future enforcement; and that it is precisely the kind of legislative effort that has consistently passed muster when attacked in this Court as constituting an impermissible classification.

And yet the district court struck down the 1963 amendment because it considered the disparities thereunder—

which are set out at J.S. App. A31-A33—too great, saying (J.S. App. A41), "we state that we can find no rational basis for the apportionment." Further, the district court held that even a disparity of 2 to 1 between Representative Districts would be too great, and set a limit of 1½ to 1 as the largest permissible variation between such districts. (J.S. App. A51-53).

We submit that this holding—concurred in by all the judges below, see J.S. App. A62, A63—which flatly states that the concept of Equal Protection of the Laws requires a 1½ to 1 ratio and forbids a 2 to 1 ratio for representative districts, constitutes a most remarkable example of reading into a generalized constitutional provision specifics that plainly did not originate in the Constitution but only in the preferences and predilections of the readers.

Surely the proposition that 1/1.50 is constitutional because extending Equal Protection while 1/2 is unconstitutional because imposing Unequal Protection represents constitutional exegesis carried to new and hitherto unsuspected degrees of refinement. Discriminations thus precise may well have amazed the drafters of the Equal Protection Clause. But so far as we are concerned the holding below on this point simply documents the observation of that great constitutional scholar, James Bradley Thayer, when he wrote, some 70 years ago (*Legal Essays*, 159), that

> "Petty judicial interpretations have always been, are now, and always will be, a very serious danger to the country."

We ask this Court to hold that the 1963 Amendment reapportioning the Delaware House of Representatives passes muster under the Equal Protection Clause.

C. Similarly, the 1963 amendment to the Delaware Constitution reapportioning the Delaware Senate complies with the Equal Protection Clause

We have already shown how Delaware, which was formed when the Three Lower Counties made themselves a formal political unit, is in consequence the one State most completely free to construct its legislature on the Federal pattern (Point I, *supra*). We have also shown that the Congress closest in time to the adoption of the Fourteenth Amendment and its Equal Protection Clause enforced that Clause under Section 5 of the Amendment (J.S. App. A71) by readmitting two formerly seceded States that had similarly fashioned their legislatures after the Federal model (Point IIA, *supra*). We have further shown that any holding that a State legislature so fashioned runs afoul of the Equal Protection Clause is untenable, and would be not only incongruous but highly arbitrary (Points IIC, IID, and IIIA, all *supra*).

Accordingly we will not reargue or even restate those propositions here, but will simply discuss the other features of the 1963 amendment reapportioning the Senate that the majority below held unconstitutional.

First. As has been pointed out, the 1963 amendment gave 7 senators to each County, retaining the existing Senatorial districts and adding two senators each to Kent and Sussex Counties each of which had previously had but five. These two additional senators were provided by providing for an election at large in each County, divided for the purpose on an east-west line. See Section 2, 3, and 4 of the 1963 amendment, J.S. App. A78-A79.

These floterial senators roused the presiding judge below to say (J.S. App. A49-A50; footnote omitted):

> "this seems to involve a hidden gerrymander that cannot be countenanced and if the reapportionment created by the 1963 Amendment met the requirements of the Equal Protection Clause in all other respects,

though it does not, this feature alone, in the absence of any substantial possibility of severability, would require us to adjudge the whole Amendment unconstitutional."

In view of the fact that the report of the Bipartisan Reapportionment Committee, on which both political parties were equally represented (Del. App. 52a, 55a-56a) and half of whose members came from New Castle County (Del. App. 85a, 100a), was entirely unanimous (Del. App. 83a, 94a), the addition of two floterial senators in Kent County and in Sussex County was hardly a gerrymander in the classic sense of one political party or one area taking advantage of the other.

But there is no need to pursue this aspect of the alleged gerrymander, because in our view the conclusive constitutional answer to this contention was given by Judge Layton, dissenting on this point below (J.S. App. A66):

> "The majority has also found unconstitutional the 1963 Amendment in so far as it concerns the creation of 2 so-called super senators from each of the two Lower Counties in order to equalize the number of senators from each County at 7. This was a most unfortunate business. Speaking as an individual I would agree with the majority that the result is sheer gerrymandering, but speaking as a judge I am unable to find such an action invalid because, in my view, a Senate composed of an equal number of senators from each county is not an unconstitutionally created body providing the membership of the Lower House is elected on a strict population basis. And simply because the Legislature chose a dubious path by which to arrive at a valid result is not grounds for judicial interference.[5]"

---

[5] [Footnote in original] The majority laid emphasis on the fact that voters in the two Lower Counties will now vote for two state senators while in New Castle County they can vote for only one. This reasoning is not without merit but since the end result is the election of seven senators from each County and because, in my view, the value of a vote for a state senator varies throughout the state because of population differences, I am not persuaded that the result offends the Equal Protection Clause."

There is nothing in the design of the floterial senators in Kent and Sussex Counties offensive to the Federal Constitution.

Second. There remain population discrepancies in the several Senatorial districts within each county, as shown at J.S. App. A34.

In view of the limited time available, and the limitation was that imposed by the district court when it allowed the Delaware legislature only from July 27, to August 6, 1962, to consider and act upon the proposal submitted by the Reapportionment Committee (*supra*, pp. 6-7; J.S. App. A1-A6), the reapportionment effected, while not perfect, was undoubtedly the best that could be made.

Within that time limitation, it was hardly feasible to provide for a complete redistricting within each county to equalize the seven senatorial districts. Indeed, it is significant in this connection that, although the district court did present to counsel a reapportionment plan of its own (Ct. Ex. 4, Del. App. 98a-99a), that plan involved only the House of Representatives and not the Senate.

We submit that a plan composed under those limitations cannot be attacked as irrational simply because under less time pressure it would have been possible to formulate a better plan. For, after all, the time factor is a vital element in the equation that circumscribes political action within the art of the possible.

In this connection, too, we desire to emphasize the stress placed by the prevailing opinion below (J.S. App. A35-37) on the circumstance that the people in New Castle County pay very much more in personal income taxes, inheritance taxes, estate taxes, license fees, and tobacco taxes than do those in Kent or Sussex Counties. The opinion (*loc. cit. supra*) states "that in the decade 1952 through 1961 * * * New Castle County collected approximately $10,500,000 in personal income taxes for each representative, while

Kent County collected less than $500,000 for each representative, and Sussex County collected approximately $800,000 per representative."

We had supposed up to now that the traditional philosophy of the Federalist Party, that government should be entrusted only to "the wise, the good, and the rich" (see S. E. Morison, *Harrison Gray Otis* (1913) *passim*), had left the American scene with the demise of that organization. But apparently we reckoned without the views of Sincock *et als.*, who would interpret the Equal Protection Clause to subject, for all time, the few and the poor to the domination of the many and the rich.

The net of the foregoing is that the 1963 amendment to the Delaware constitution complies in all respects with the Equal Protection Clause. From this it follows that the judgment below should be reversed, with directions to dismiss the bill.

IV. THE DISTRICT COURT'S REFUSAL TO GIVE THE DELAWARE GENERAL ASSEMBLY SUFFICIENT TIME TO REAPPORTION THE STATE, AND ITS ISSUANCE OF AN INJUNCTION THAT PREVENTED AMENDMENT OF THE DELAWARE CONSTITUTION ACCORDING TO THE TERMS OF THAT INSTRUMENT, CONSTITUTED FUNDAMENTAL AND VITIATING ERROR.

A. The record shows a continuous course of urgency, haste, and pressure on the part of the district court that is wholly at variance with the standards and approaches prescribed by this Court for litigation involving a State of the Union

On any objective reading, the present record reflects a dominant theme of pressure against a time limit that is wholly at variance with the principles that this Court has formulated to govern litigation involving States of the Union.

First. Each of the opinions of the district court emphasizes, in one form or another, a spirit of haste, of pressure, and of let-us-get-on-with it, which permeated that tribunal's

approach to the grave problem of refashioning a State's Constitution.

In its first opinion (J.S. App. A1-A6), filed on July 25, 1962, the district court stayed the present proceedings only until August 7, 1962, because it was unwilling to let the General Assembly wait. See the excerpt quoted above at pp. 6-7. In this connection, it should be noted that, under Art. XVI, Sec. 1, of the Delaware Constitution (J.S. App. A76), an amendment to the Delaware Constitution must be passed by a two-thirds vote of both houses of successive General Assemblies. The district court was unwilling to let such a reapportionment amendment be effected by the 1963-64 (122nd) and 1965-66 (123rd) General Assemblies. Instead, the court below espoused another alternative, to push the matter through in a great rush. We have already discussed the resultant imperfections of the alternative actually adopted (*supra*, Points IIIB and IIIC), and we advert to them again below, pp. 107-109.

In order to expedite the reapportionment process, the district court suggested that the Delaware General Assembly amend the State Constitution so that apportionment would thereafter be regulated by statute rather than constitutional provision; see the excerpt from J.S. App. A4, quoted above at p. 7.

Thus a Federal Court undertook to recommend a fundamental change in State constitutional policy, for as a matter of political stability apportionment in Delaware had been a subject for constitutional regulation since 1776.

Subsequently, after the constitutional amendment reapportioning the State, House Bill 574 (*supra*, p. 8), had been passed on July 30, 1962 by the 121st General Assembly, the Delaware election officials, defendants below and appellants here, moved for a further stay to enable the 122nd General Assembly, coming into office on January 8, 1963, to be given an opportunity to concur in House

Bill 574, and to make it effective as an amendment to the State Constitution.

The district court denied the stay, expressing in the process its pique over the fact that the General Assembly had not adopted the district court's earlier suggestion that apportionment in Delaware be made a statutory rather than a constitutional matter, and concluding that "This in effect leaves this court in a position where it must proceed promptly to adjudicate the merits of the controversy after full hearing." For the full comment, see the excerpt from J.S. App. A15-A16 quoted above at pp. 10-11.

Throughout the trial, the presiding judge emphasized that "The terrible problem here is one of time" (Tr. 357), repeating twice his expression about "a box of time" (Tr. 607, 608-609).

In the district court's final opinion, the presiding judge again emphasized the time element (J.S. App. A55): "The State of Delaware, the General Assembly, and this court all seem to be trapped in a kind of box of time. The exigencies of the calendar and the oncoming general election of 1964 confront us."

In that opinion, the district court (J.S. App. A56), "Having the box of time in mind," further said "we will allocate to the General Assembly a period of time from the date of our final decree up to and including October 1, 1963, to prepare and enact into law a reapportionment statute acceptable under the law and the guidelines we have endeavored to lay down herein."

We submit that, notwithstanding the presiding judge's subsequent disclaimer (Del. App. 97a), the record amply confirms the view of the Chairman of the Governor's Bipartisan Reapportionment Committee (Del. App. 88a) that:

> "We felt this Court had a gun at the back of the General Assembly of Delaware, and we had better apportion the House of Representatives on a popula-

tion basis under Baker versus Carr, and as fast as we could."

It is thus all too obvious that the "box of time" of which the presiding judge so consistently complained was fashioned by the district court itself.

Second. Moreover, the court below disregarded the principles that should govern litigation involving a State of the Union—and of course the decree and injunction here directly affect the State of Delaware regardless of the docket title of the cause.

In *Virginia* v. *West Virginia*, 220 U.S. 1, 36, at one stage of the long and indeed bitter litigation between those two States, this Court said:

> "A long time has elapsed. * * * But this case is one that calls for forbearance upon both sides. Great States have a temper superior to that of private litigants * * *."

Again, at a later stage, in *Virginia* v. *West Virginia*, 222 U.S. 17, 19-20, this Court said:

> "A question like the present should be disposed of without undue delay. But a State cannot be expected to move with the celerity of a private business man; it is enough if it proceeds, in the language of the English Chancery, with all deliberate speed. Assuming, as we do, that the Attorney General is correct in saying that only the Legislature of the defendant State can act, we are of opinion that the time has not come for granting the present motion. If the authorities of West Virginia see fit to await the regular session of the Legislature, that fact is not sufficient to prove that when the voice of the State is heard it will proclaim unwillingness to make a rational effort for peace."

A particularly significant ruling came in *Virginia* v. *West Virginia*, 241 U.S. 531. There, after the amount due the Commonwealth of Virginia had been determined (*Vir-*

ginia v. *West Virginia*, 238 U.S. 202), that Commonwealth petitioned for a writ of execution against West Virginia, "on the ground that such relief is necessary, as the latter has taken no steps whatever to provide for the payment of the decree" (241 U.S. at 531).

West Virginina resisted on three grounds (241 U.S. at 531-532):

> "(1) 'Because the State of West Virginia, within herself, has no power to pay the judgment in question, except through the legislative department of her government, and she should be given an opportunity to accept and abide by the decision of this court, and, in the due and ordinary course, to make provision for its satisfaction, before any steps looking to her compulsion be taken; and to issue an execution at this time would deprive her of such opportunity, because her legislature has not met since the rendition of said judgment, and will not again meet in regular session until the second Wednesday in January, 1917, and the members of that body have not yet been chosen;' (2) because presumptively the State of West Virginia has no property subject to execution; and (3) because, although the Constitution imposes upon this court the duty, and grants it full power, to consider controversies between States, and therefore authority to render the decree in question, yet with the grant of jurisdiction there was conferred no authority whatever to enforce a money judgment against a State if, in the exercise of jurisdiction, such a judgment was entered."

Here was this Court's ruling (241 U.S. at 532):

> "Without going further, we are of the opinion that the first ground furnishes adequate reason for not granting the motion at this time.
>
> "The prayer for the issue of a writ of execution is therefore denied, without prejudice to the renewal of the same after the next session of the legislature of the State of West Virginia has met and had a reasonable opportunity to provide for the payment of the judgment."

All of the foregoing remarks were made in the controversy involving Virginia's efforts to have West Virginia assume its rightful share of the combined States' pre-separation debt—a suit seeking simply a money judgment. Here, however, there is involved, not what Sincock *et als.* semantically inflate (M/A 20) into "the debasement of the Civil Rights of the plaintiffs"—capitalization in the original—but rather a controversy revolving around the grave problem of a State's very structure of government.

Moreover, this controversy was not one like *Watson* v. *City of Memphis*, 373 U.S. 526, 529, where it could properly be said that "the governing constitutional principles no longer bear the imprint of newly enunciated doctrine." To the contrary, everything in this case was new, for *Baker* v. *Carr*, 369 U.S. 186, plainly had not laid down guidelines for reapportionment, much less determined the overriding issue here, which was and is whether a State legislature may constitutionally be constructed on the Federal pattern. The latter issue, indeed, had been specifically reserved here, almost a month before the final opinion below. *Gray* v. *Sanders*, 372 U.S. 368, 376.

Yet, notwithstanding that the organic structure of a State government was involved, notwithstanding that the governing principles had not been settled or even adumbrated, notwithstanding the admonitions of this Court regarding the spirit in which litigation involving States of the Union is to be conducted and the judicial standards that should govern directions given in such litigation, the district court in this case of literal first impression involving the constitutional shape of Delaware harried and hurried the election officials who as nominal defendants represented the State as though they were so many reluctant respondents against whom a turnover order had been made in a bankruptcy proceeding.

We content ourselves with saying that this is not the way that a court of the United States should deal with the constitution of a constituent State of the Union.

B. The combination of the decree and the injunction below, which effectually prevent any amendment of the Delaware Constitution according to the terms of that instrument, constitutes a gross abuse of judicial power

If, as held by the district court, the apportionment provisions of the Delaware Constitution offend the Equal Protection Clause, then, as can easily be demonstrated, the decree and injunction entered below (J.S. App. A68-A70) effectively preclude amendment of that instrument according to its terms. And while Sincock *et als.* quite agree on this point (M/A 24), we feel it desirable to document the assertion just made.

Article XVI of the Delaware Constitution provides two methods of amendment. Section 1 (J.S. App. A76), the mode employed in 1962-1963, provides for amendment by the General Assembly by a two-thirds vote of both houses, followed first by a general election, and then by a second two-thirds vote of both houses of the newly elected General Assembly. Section 2 (J.S. App. A76-77) provides for a Constitutional Convention, to be composed of one member from each representative district plus two additional members from each county.

The court below has effectively disabled the State of Delaware from amending its Constitution by either of those two methods.

(1) The present General Assembly sits until the general election in November 1964. Until that time it can, by a two-thirds vote, initially pass a new apportionment amendment. This amendment, to become effective, must then be similarly passed by the next succeeding General Assembly which will be elected in November 1964, and which will sit until November 1966. But, if the injunction entered below remains in force, no new General Assembly can be elected, and hence no new amendment to the Delaware Constitution can ever be adopted under the first method.

(2) The decree below (J.S. App. A68) declared unconstitutional the apportionment provisions of the 1897

Constitution, Art. II, Sec. 2 (J.S. App. A71-A75), with its 35 representative districts, five senators each to Sussex, Kent, and rural New Castle, and two senators to Wilmington, on the footing that this arrangement is neither reasonable nor rational (J.S. App. A40-41). The constitutional convention provision of the same instrument, Art. XVI, Sec. 2 (J.S. App. A76-A77), provides for a convention of 41 members, 35 from the several representative districts, plus two from each of the three counties, and this was specifically continued by the 1963 amendment (J.S. App. A81).

Plainly, if the legislative apportionment provision of the Delaware Constitution is unreasonable or irrational because of the current distribution of Delaware's population, then so is the constitutional convention apportionment provision; if, because of malapportionment, a new General Assembly can not be validly constituted, then a Constitutional Convention for the same reason can not be validly constituted. Indeed, this follows as an *a fortiori* proposition, because Section 2B of the 1963 amendment (J.S. App. A81) specifically provided that no delegates could be elected to a Constitutional Convention from any of the new Representative Districts added by Section 2A thereof. This was the view of Sincock *et als.* below (J.S. App. A3); it is their view now (M/A 24); and it appears to have been adopted by the district court following a full trial (J.S. App. A56).

How, then, can the paralyzing injunction be justified?

Sincock *et als.* (M/A 24-25) characterize its issuance as an exercise of the district court's sound discretion, on the footing that the General Assembly was still free to reapportion by statute—notwithstanding that apportionment in Delaware has been a constitutional matter since 1776—and urge that the election officials' complaint "is that the action of the District Court will not permit the Legislature to delay the enjoyment of the exercise of their full franchise to these appellees until the 1966 election."

This last statement however, strongly begs the question at issue, which is, at the very least, far from clear. It has yet to be demonstrated that to compose a State legislature on the Federal model derogates from the enjoyment of the exercise of anyone's full franchise. Even in private causes, the traditional equity standard in respect of injunctions is the time-honored formula that "To doubt is to deny." Much more, then, should a Federal court of equity stay its hand when the validity of the organic structure of a State of the Union is at issue.

Perhaps the real clue to the injunction below, which, as we have pointed out (*supra*, p. 18), was entered on the district court's own motion and without any hearing, is another instance of the same pique that was expressed at an earlier stage of the present litigation (J.S. App. A15-A16, quoted above at pp. 10-11).

For, as Sincock *et als.* duly emphasized (M/A 10-11, 24-25), the district court's final opinion of April 17, 1963 (J.S. App. A16-A67) and its final decree of April 30 (J.S. App. A68) were followed by an opinion of the Supreme Court of Delaware to the Governor on May 6 (Del. App. 1a-5a), holding that the 1963 amendment was effective nevertheless, and by the Governor's Proclamation on May 17 (Del. App. 5a-10a), announcing a reapportionment pursuant thereto.

The Delaware Supreme Court's opinion counseled deference to the district court's opinion and decree, pointing out however the obvious fact that that decree was subject to appeal (Del. App. 4a-5a). The Governor's Proclamation duly recited the fact of the decree and the circumstance that the time to appeal therefrom had not expired. (Del. App. 5a-6a). Thereupon, just three days later, without notice and without a hearing, the district court issued its injunction (J.S. App. A69-A70)—and refused to stay that injunction when requested to do so after the first notice of appeal, from the final decree, had been filed.

Thus the entire constitutional apparatus of a State of the Union and its entire electoral machinery were paralyzed

by Federal judicial decree because the defendant election officials, appellants here, refused to accept as conclusive pending appeal the district court's Design for Delaware.

It took an application to the Circuit Justice for a stay pending appeal, which was promptly forthcoming, to restore a sense of balance and to effect a return to traditional and normal judicial standards.

We said in bringing the present appeal here (J.S. 21):

> "The net of the foregoing is that a court of the United States, after declaring unconstitutional under the Constitution of the United States the apportionment provisions of a State Constitution, has effectually disabled the State from ever amending that instrument according to its terms. This, we submit, is more than abuse of discretion. This is an abuse, a gross abuse, of judicial power."

Today, some three months later, after this Court has not only agreed to hear this case but has granted our motion to advance, we feel no need to vary a single word of the foregoing.

C. The record further shows a consistent compulsion on the part of the district court to effect a reapportionment of the Delaware General Assembly by Federal judicial decree

First. As we have shown (*supra*, Points IIIB and IIIC), the 1963 amendment to the Delaware constitution was hastily drawn, because the district court refused the General Assembly more time for deliberation. Had such time been allowed, then it would have been entirely feasible, using the basic Federal pattern for the composition of the Delaware General Assembly, to provide for the equalization of Representative and Senatorial Districts within each of the State's three counties.

Such a plan, we should say for the information of this Court, was duly prepared and presented in the second report of the Governor's Bipartisan Reapportionment Committee in June 1963, submitted after the decree below, and bills for that purpose were introduced in both houses

of the General Assembly in June 1963. One of these bills, Senate Bill 195, providing for the equalization of Senatorial Districts within each county, was duly passed by the Senate on June 27, 1963; the House took no action, either on Senate Bill 195 or on a companion measure (House Bill 373) that was designed similarly to equalize all Representative Districts within the State.

This Court has said (*Girouard* v. *United States*, 328 U.S. 61, 69), "It is at best treacherous to find in Congressional silence alone the adoption of a controlling rule of law." It is similarly risky to attach controlling significance to a State legislature's inaction.

Perhaps the General Assembly was averse to any reapportionment by statute in the face of the consistent Delaware tradition that this was a matter too basic to be entrusted to the vagaries of successive legislatures, that a subject so fundamental must be regulated by the State's fundamental law.

Perhaps the General Assembly was also of opinion that to effect a reapportionment pending appeal would render the present appeal moot. Or perhaps the General Assembly believed that it would stultify itself by complying with the district court's decree after it had directed an appeal from that very decree in an act whose preamble recited that "the Constitution of the State of Delaware is unique and there are cultural and historical factors peculiar to the State of Delaware, distinguishing the Delaware case from all others in the nation," and reciting further that "it is in the best interest of the General Assembly and of the State of Delaware, and its people that the provisions of the Constitution of the State of Delaware be upheld and amended only by the elected Representatives of the people." Chapter 90, Vol. 54, *Laws of Delaware*.

It is not profitable to speculate further. Rather, it is sufficient here simply to note, first, that a more perfect apportionment could easily have been formulated if the district court had allowed Delaware time to do so; and, second, that the circumstance that no further action re-

specting reapportionment has been taken during the pendency of the present appeal by no means establishes that the Delaware General Assembly is either unwilling or unable to effect a reapportionment consistent with the Constitution of the United States once this Court has established the governing guidelines. But, as will appear, the district court is shown on this record to have been far more interested in proceeding by judicial decree.

Second. This Court in *Virginia* v. *West Virginia*, 246 U.S. 565, announced its power and determination to enforce a money judgment against a State of the Union. But, very plainly, such a step comes at the end of the judicial process, not to be lightly undertaken or even entertained, and in that instance happily proved unnecessary.[17] Indeed, to rewrite a State's constitution and to reapportion a State legislature, all by a decree issuing out of a United States District Court, seems to us much like the final step of outlawry that was the ultimate sanction of the common law (3 Bl. Comm. *283-284, 4 *id.* *318-320).

Here, however, in a vastly more complex situation, where State reapportionment by Federal court decree necessarily involves a rewriting of a State constitution, and hence should have been the very last resort, the court below seems to have been irresistibly drawn to that course as the preferred first order of business, and this before any authoritative guidelines had been announced here.

Thus, at the very outset of the litigation, the district court undertook to advise the General Assembly how it should amend the State Constitution (J.S. App. A4;

---

[17] See W. Va. Acts 1919 (Ex. Sess.), c. 10, providing for payment of judgment partly in cash and partly by bonds that Virginia had agreed to accept at par. For discussions of the enforcement problem, see Coleman, *The State as Defendant under the Federal Constitution*, 31 Harv. L. Rev. 210; Powell, *Coercing a State to Pay a Judgment*, 17 Mich. L. Rev. 1; Fischer, *Enforcement of a Money Judgment against a State*, 12 St. Louis L. Rev. 57; Good, *Judicial Determination of Interstate Disputes*, 26 Neb. L. Rev. 1; cf. Note, *The Virginia-West Virginia Debt Controversy*, 31 Harv. L. Rev. 1158.

supra, pp. 7, 99), and then publicly regretted that its gratuitous advice had not been followed (J.S. App. A15-A16; *supra*, pp. 10-11, 100); next, the district court presented at the pretrial conference a reapportionment plan of its own so far as the lower house was concerned (Ct. Ex. 4, Del. App. 98a-99a), and invited the parties to comment on it (*supra*, pp. 12-13); at the trial on the merits, the district court invited Sincock *et als.* to submit a plan of reapportionment, heard extensive testimony thereon (*supra*, p. 13), and commented on that plan—and on the numerous errors therein—at some length in its final opinion (J.S. App. A57-A62); additionally, the district court set a deadline for the General Assembly to pass a reapportionment statute (J.S. App. A56-A57), on the footing that there was no longer any valid provision in the Delaware Constitution regulating apportionment; and, finally, by preventing any amendment of the Delaware Constitution in the manner prescribed by that instrument, the court below virtually assured to itself the task of reapportioning the Delaware General Assembly by Federal judicial decree, a task which, indeed, Sincock *et als.* urged it to assume, and for which the presiding judge declared himself quite ready (Tr. 737; J.S. App. A56-A57).

Except only for the currently adduced proposal for a "Court of the Union" to be composed of the fifty Chief Justices of State courts of last resort, which shall review the judgments of this Court, we know of nothing equally destructive of the State-Federal relationship that is, literally, indispensable to the very existence of the Republic, as the course so relentlessly pursued—and pressed—by the district court in this case.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed, with directions to dismiss the complaint.

If, however, the Court should be of opinion that, while Delaware is entirely free to model its legislature on the Federal pattern, with each of its Counties entitled to equal representation in the senate thereof, there is still need to

ameliorate the population discrepancies now present under th 1963 reapportionment amendment, then the judgment below should be reversed, with directions that the district court stay all further proceedings herein until the present (1963-1964) and the next following (1965-1966) General Assemblies shall have had an opportunity to amend the Constitution of Delaware in the manner prescribed by that instrument, in order to conform it to the judgment of this Court.

Respectfully submitted.

FREDERICK BERNAYS WIENER,
1025 Connecticut Avenue, N. W.,
Washington 36, D. C.,

DAVID P. BUCKSON,
Attorney General of the State of Delaware,
Dover, Delaware,

E. NORMAN VEASEY,
Chief Deputy Attorney General of the State of Delaware,
Public Building,
Wilmington 1, Delaware,

JANUAR D. BOVE, JR.,
Beneficial Building,
Wilmington 99, Delaware,

JAMES H. HUGHES, III,
325 South State Street,
Dover, Delaware,

FRANK O'DONNELL,
Delaware Trust Building,
Wilmington 1, Delaware,

N. MAXSON TERRY,
48 The Green,
Dover, Delaware,

Counsel for the Appellants.

NOVEMBER 1963.

APPENDIX

EXCERPTS FROM THE DEBATES IN THE 40th AND 41st CONGRESSES ON THE READMISSION OF THE FORMER CONFEDERATE STATES.*

The bill that became the Act of June 25, 1868, *supra*, p. 57, pursuant to which six former Confederate States were readmitted, was H.R. 1058, 40th Cong., 2d sess. (Cong. Globe, 40th Cong., 2d sess., p. 2412).

Mr. Bingham (p. 2413) promptly offered an amendment to strike the words,

> "That the constitutions of said States shall never be so amended or changed as to deprive any citizen or class of citizens of the United States of the right to vote who are now entitled to vote by said constitutions respectively, except as punishment for such crimes as are now felonies at common law whereof they shall have been duly convicted."

and to insert in lieu thereof,

> "that civil and political rights and privileges shall be forever secured in said States to all citizens of the United States resident therein, as is now provided in said constitutions respectively."

Mr. Thaddeus Stevens of Pennsylvania offered an amendment to be added to the Georgia constitution, as follows (p. 2445):

> "And be it further enacted that the provisions of section seventeen article five of the Constitution of Georgia shall not apply to a debt due any person who, during the whole time of the rebellion was loyal to the United States and opposed to secession."

Mr. Pruyn thereupon raised a point of order, requesting a ruling that the House had no right to legislate so as to interfere with the provisions of constitutions of any

---

* We acknowledge our obligation to John F. Doyle, Esq., of the District of Columbia Bar for assistance in sifting and analyzing the voluminous debates dealing with this subject.

State. The Speaker overruled the point of order, on the ground that he had no authority to rule on the constitutionality of a bill.

Mr. Stevens supported the authority of Congress to make such amendments, saying (p. 2445):

> "I find it in the Constitution which says that Congress may admit new States. I hold that under that provision Congress may admit them in such shape as it pleases. That power being fully granted we have a right to exercise it. I do not find any difficulty about it."

To this Mr. Beck of Kentucky countered (p. 2446):

> "* * * I say in all candor that his proposition to amend the constitution of the State of Georgia because it does not suit this House is presenting the issue fairly and clearly. This House made that constitution; it ordered how it should be made, selected or rather appointed the men to frame it, and all the others excluded from or admitted to the polls whom they pleased and under the pretense of an election not only told the people of these States what their constitutions should be and remain but that none but the adherents of the dominant party should have any part or lot in the administration of the governments under them, no matter how odious they might be to the people there.
>
> "These constitutions do not represent the action of the people of any of those States but they represent in fact the will and the orders of Congress."

And Mr. Beck continued with a general attack on the reconstruction program (pp. 2447-2450).

Mr. Garfield of Ohio declared a nullity the act of the Ohio legislature purporting to withdraw that State's ratification of the Fourteenth Amendment (p. 2451), and then supported the pending bill (p. 2452). Further general debate on the bill ensued (pp. 2453-2456).

On the next day, May 14, 1868, Mr. Bingham spoke on his amendment (p. 2462), after which another amendment,

to exclude the State of Alabama from the pending bill, was voted down (p. 2463).

Thereupon Mr. Stevens argued further, first in support of the bill and then in opposition to the pending Bingham amendment (pp. 2464-2465):

"* * * Now, sir, what is the particular question we are considering. Five or six States have had submitted to them the question of forming constitutions for their own government. They have voluntarily formed such constitutions under the direction of the Government of the United States. * * * They have sent us their constitutions. Those constitutions have been printed and laid before us. We have looked at them. We have pronounced them republican in form; and all we propose to require is that they shall remain so forever. Subject to this requirement, we are willing to admit them into the Union. * * *

"* * * The Gentleman from Ohio (Mr. Bingham) has moved an amendment against which I most earnestly protest. He proposes against the recommendation of the committee to leave each of these states free after its admission to amend the provisions with reference to the elective franchise as it may deem proper with regard to its own citizens. All of those States have now adopted the principle of Universal Suffrage. The country has adopted that principle so far as it has spoken of late. What we desire is to secure in these States the maintenance of this principle which they have adopted so that every person of requisite age within those States shall be entitled to vote."*

---

* In view of the Court's comment in *United States* v. *Florida*, 363 U.S. 121, note 13 at 127, that "The congressional history indicates that all the constitutions were given equally close attention," it seems appropriate to quote what Mr. Stevens said about the Arkansas constitution in discussing the bill that became the Act of June 22, 1868, *supra*, p. 57, which dealt only with Arkansas (p. 2399):

"Now, all I have to say is this: this constitution of Arkansas has been before us for four weeks, fairly printed. * * * I think that this constitution is above all suspicion, and I am a little

Mr. Stevens' amendment (p. 2445; quoted *supra*, at p. 112) was adopted, as was the Bingham amendment, the latter in the following form:

> "That the constitutions of the said States shall never be amended or changed so as to discriminate in favor of or against any citizen or class of citizens in the right to vote who are now entitled to vote by said constitutions respectively, except as a punishment for such crimes as are now felonies at common law, whereof they shall have been duly convicted; and no person shall ever be held to service or labor as a punishment for crime in said States except by public officers charged with the custody of convicts by the laws thereof."

Thereupon the bill passed the House by a vote of 109 to 35, with 45 members not voting.

On May 16, 1868, the bill reached the Senate, where it was referred to the Committee on the Judiciary (p. 2488).

On June 5, Mr. Trumble reported (p. 2858) that the Committee had struck out Alabama and divided on whether or not to insert Florida. The Committee also struck out a further provision of the Georgia constitution, and inserted a provision requiring that the Georgia legislature declare the assent of that State to those excisions; this was said to be in accordance with a similar requirement imposed on Missouri in 1821.

Extensive debate followed (pp. 2859-2871, 2895-2900, 2902-2904). Specific debate then centered on whether or not

---

scrupulous and particular about any constitution I am called to vote for. Now, with a constitution with which I can find no fault, after it has been so long before us, I cannot for a moment conceive that there has not been time enough allowed for all of us to become acquainted with it. And as in equity that is presumed to be done which should be done, which ought to be done, therefore it is to be presumed that there is not a man in this House who does not know all about this constitution."

Alabama should be in the bill (pp. 2927-2934, 2964-2967), with the result that Alabama was put back into the bill by a vote of 22 to 21.

Senator Sherman (p. 2968) moved to strike out the clause imposing on Georgia the "fundamental condition" that she eliminate portions of her constitution. (The language he proposed to strike is that which became the proviso to Sec. 1 of the Act of June 25, 1868, as finally passed; it is quoted at p. 64, *supra*). Senator Sherman said in support of his amendment (p. 2969):

> "When we go beyond securing the enforcement of the guaranty of republican government, which we have the power to do, when we undertake to legislate for them upon matters on which we have passed, we transcend our powers."

On June 9, 1868, Senator Trumble recurred to the question of Georgia's constitution, saying (p. 2969):

> "Mr. President, the authority by which Congress declares these cases null and void in this particular case is to be found in a provision in the constitution of Georgia itself. The people of the State of Georgia when they adopted their constitution in convention and ratified it at the polls provided that Congress might accept the constitution with conditions. That provision will be found in sec. II of Article II:
>
> "'Should this constitution be ratified by the people and Congress accept the same with any qualifications or conditions the government herein provided for, and the officers elected shall nevertheless exist and continue in the exercise of their several functions as the government of this State so far as the same may be consistent with the action of the United States in the premises.'"

On the following day, Senator Williams said (pp. 2998, 3000):

> "• • • If I understand the reconstruction laws it is not necessarily the duty of Congress to revise the

Constitution of every one of these States, and if in the judgment of Congress some clause may be there found which may be regarded as in contravention of the Constitution of the United States, to strike out that clause and revise and amend the constitution and make it in entire conformity to our views of law or expediency, because if we assume to pursue that course we might just as well have made these constitutions at the beginning and sent them down there with instructions to the people to adopt them as the constitutions of the several States. It seems to me, as this is a doubtful question, that the people of the State of Georgia should be left to decide it for themselves as to whether or not this section of their constitution does accord with the Constitution of the United States. To undertake to revise it by these so-called fundamental conditions is undertaking, it seems to me on our part to make a constitution for the people of Georgia; and certainly it cannot be said that their constitution with this clause in it is not republican in form, as it is required to be by the reconstruction laws of the Congress.

* * * * * * * * *

"* * * Now, Sir, ought we not let the people of the State of Georgia manage this matter for themselves? We are in no way implicated if we accept this constitution. We did not make it. We do not pass any judgment upon this provision of the constitution. I doubt not there are many provisions in all these constitutions about the constitutionality of which men might very properly differ, but if any man is aggrieved by any provision of any constitution there that is supposed to be unconstitutional, the courts of the country are open to redress, and that man can vindicate his rights there. But, Sir, I deny that it is our business to undertake to supervise the creation of these constitutions beyond requiring that they shall be republican, that they shall protect the civil and political rights of all men; but so far as contracts are concerned or commerce or business within the jurisdiction of the several States, I submit that the people there ought to be left to regulate those matters for themselves."

Senator Conkling said (p. 3001):

> "* * * The constitution proposed by the State of Georgia provides for its own acceptance by Congress, with such qualifications or conditions as may be thought necessary by the Congress of the United States; but I did not suppose that it was necessary to appeal to this provision of the constitution of Georgia in order to vindicate the recommendation of the Committee. On the contrary, it seemed to me that this proposition fell precisely within the principle of the Missouri case. That constitution as was alleged, in defiance of the Constitution of the United States attempted to set up an inequality in its own favor; and it was to level that distinction and to conform it to the Constitution of the United States that Congress imposed what was there called a condition. * * *"

Following further debate (pp. 3002-3007), Senator Sherman's amendment was defeated, 35-8 (p. 3008), and Senator Williams offered a further amendment, reading:

> "and thereupon the officers of each State duly elected and qualified under the constitution thereof shall be inaugurated without delay; but no person prohibited from holding office under the United States or under any State by section three of the proposed amendment to the Constitution of the United States known as Article Fourteen shall be deemed eligible to any office in either of the said States."

In support of his amendment, Senator Williams said (p. 3008):

> "* * * As to the other provisions the adoption of the constitutional amendment by the Legislature of a State does not necessarily put the constitutional amendment in force and by virtue of that constitutional amendment certain persons are made ineligible to any office under the Government of the United States or under any State government. * * * There is a question in the country as to whether or not that amendment is now a part of the Constitution of the United States; but in any event, no matter what may be

> the view taken of that question when these States ratify the constitutional amendment and when it becomes a part of the Constitution which it is supposed will be the necessary effect of their action, let their offices be subject to that amendment. If persons who will be ineligible under the constitutional amendment when it takes effect are now permitted to go into office, the offices will be vacated by the adoption of that constitutional amendment. Why not provide at once that no such men shall be inaugurated. * * *"

After discussion (pp. 3009-3012), the Williams amendment was adopted by a vote of 28 to 15 (p. 3013).

Thereupon there was further discussion concerning the inclusion of Alabama (pp. 3014-3016), but a further amendment to strike Alabama from the pending bill was lost, 16 to 24 (p. 3017).

Next followed (pp. 3018-3021) discussion of a provision in Alabama's constitution that read:

> "That all navigable waters shall remain forever public highways, free to the citizens of the State and the United States, without tax, impost, or toll imposed, and no tax, toll, impost or wharfage shall be demanded or received from the owner of any merchandise or commodity for the use of the shores or any wharf erected on the shores or in or over the waters of any navigable stream, unless the same be expressly authorized by the General Assembly."

Mr. Conkling moved to excise this provision because "it deprives riparian owners of the rents, issues and profits of their land," but his proposal was voted down, 16 to 23 (p. 3022).

Thereupon, Senator Summer made a long speech (pp. 3024-3027), in the course of which he said:

> "* * * The song of States' Rights has for its constant refrain the asserted *Equality of the States.*
>
> * * * * * * * * *

"If we look further and see how the senatorial equality of States obtained recognition in the Constitution we shall find new occasion to admire that facility which has accorded to this concession so powerful an influence, and here the record is explicit. The National Convention had hardly assembled when the small States came forward with their pretensions. Not content with suffrage in the Senate, they insisted upon equal suffrage in the House of Representatives. They had in their favor the rule of the Continental Congress and also of the Confederation, under which each State had one vote. Assuming to be independent sovereignties they also had in their favor the rule of International Law. Against these pretentions the large States pleaded the simple rule of justice and here the best minds concurred. At an early day we find Mr. Madison moving that 'the equality of suffrage established by the confederation ought not to prevail in the National Legislature.' This proposition so consistent with reason was seconded by Gouverneur Morris and according to the report 'being generally relished,' was about being adopted when Delaware, by one of her voices on the floor, protested, saying that, in case it were adopted, 'it might become the duty of her delegates to retire from the convention.' Such was the earliest cry of secession. Gouverneur Morris, while observing that the valuable assistance of these delegates could not be lost without real concern, gave his testimony that the change proposed was so fundamental an article in a National Government that it could not be dispensed with (Elliot: Debates, Vol. 5, p. 135). Mr. Madison followed by saying very justly that 'whatever reason might have existed for the equality of suffrage when the Union was Federal among sovereign States it must close when a National government should be put in its place.' Franklin in a similar spirit reminded the convention that the equal suffrage of the States 'was submitted to originally under a conviction of its impropriety, inequality and injustice (ibid., p. 181). This is strong language from the wise old man but very true. Elbridge Gerry after depicting the States as intoxicated with the idea of their sovereignty said that 'the injustice of allowing each an equal vote was long insisted on; that he voted for it; but that it was against

his judgment and under the pressure of public danger and the obstinacy of the lesser States (ibid., 259). Against these overwhelming words of Madison, Morris, Franklin and Gerry, the delegates from Delaware pleaded nothing more than without an equal suffrage, 'Delaware would have about one-ninetieth for its share in the general councils while Pennsylvania and Virginia would possess one-third of the whole'; and New Jersey by her delegates pleaded also that 'it would not be safe for Delaware to allow Virginia sixteen times as many votes as herself.' (Ibid., p. 211) On the part of the small states the effort was for power disproportionate to size. On the part of the large states there was a protest against the injustice and inequality of these pretensions especially in a Government national in character. The question was settled by the great compromise of the Constitution according to which representation in the House of Representatives was proportioned to population while each state was entitled to equal suffrage in the Senate. To this extent, the small states prevailed and the Senate ever since has testified to the equality of states or rather according to the language of the Federalist on this very point, it has been the 'palladium to the residuary sovereignty of the States.' (Federalist No. 43)

* * * * * * * * * *

"* * * I conclude as I began, in favor of requiring conditions from States on their admission into the Union and I insist that it is our especial duty, in every possible way, by compact and by enactment to assure among these conditions the equal rights of all and the participation of every citizen in the government over him without which the State cannot be republican. * * *"

On June 10, 1868, the bill passed the Senate, 31 to 5, with 18 not voting (p. 3029). When it was reported back to the House (p. 3090), there was discussion primarily about Florida (pp. 3091-3096). In the course of that discussion, Mr. Paine, a member of the Committee on Reconstruction, said (p. 3091):

"* * * it has been my duty as a member of the committee to scrutinize this constitution. I ought to explain to the House its character. After I have done that it will be for each member to decide himself whether he will or will not vote for concurrence."

And another member said (p. 3094):

"With a microscopic view the Committee on Reconstruction, or a majority of them, have looked into the details of the constitution of Georgia, and propose to strike out of it certain provisions."

In the end, the House concurred in the Senate amendments, 111 to 28, with 50 not voting (p. 3097).

The President vetoed the bill (p. 3484), but it was passed over his veto (pp. 3485, 3488), and became the Act of June 25, 1868, c. 70, 15 Stat. 73, discussed *supra*, pp. 57 *et seq.*

We turn now to the 1st Session of the 41st Congress, to the debates on the measure that eventually became the Act of December 22, 1869, *supra*, pp. 64, 65-66.

On April 7, 1869, (Cong. Globe, 41st Cong., 1st sess., p. 591), Mr. Butler of Massachusetts, from the Committee on Reconstruction, reported H.R. 259 "to enforce the fourteenth amendment to the constitution and laws of the United States and to restore the State of Georgia to the republican government elected under its new constitution."

Mr. Butler said (p. 591):

"The first section of the bill provides that the Governor of the State of Georgia shall be authorized and directed forthwith by proclamation to summon all persons appearing to have been elected to the senate and house of representatives of said State by the proclamation of Major General George G. Meade, commanding the military district including the State of Georgia, dated June 25, 1868, to appear at a day certain, to be named in said proclamation, at Atlanta, in

said State, within six months from the passage of this act; whereupon the members of said senate and house of representatives, qualified as hereinafter provided, shall assemble on the day named, and organize their respective houses under the constitution of the State of Georgia and the laws of the United States, and then shall be invested with authority to make such enactments and have such legislative proceedings as are authorized by the laws of the United States and the constitution of the State of Georgia.

"The second section provides that when the persons so elected to said senate and house of representatives shall be convened as aforesaid each and every person claiming to be elected as a member thereof shall take and subscribe the oaths of office prescribed by law for officers of the United States and by the constitution and laws of the State of Georgia, before the district judge of the United States for the district of Georgia, who is hereby authorized to administer the same, and file the same in the office of the secretary of the State of Georgia, unless the disability of such person so to do shall have been removed by act of Congress, which oaths or affirmations shall be recorded by the secretary of the State of Georgia; and the originals or a copy of the record thereof, duly certified by the said secretary of State, shall be competent evidence; and every person claiming to be so elected, who shall refuse or decline or neglect or be unable to qualify himself as above provided, shall not be admitted to a seat in the senate or house of representatives of said State, or to participation in the proceedings of either of them, but shall be regarded as ineligible. * * *

"The third section provides that the attempted expulsion of the members of the senate and the house of representatives of the State of Georgia heretofore had on the ground that they were of African descent is hereby declared void."

To this Mr. Beck argued (pp. 592, 594):

"* * * Before the House can consider understanding the propositions contained in this Bill it is indispensable that the present status of Georgia should be

fully understood and carefully considered because I assume that there is no man so radical—I might say so utterly regardless of decency—as to vote to set aside and annul her State government if she has fully complied with your own reconstruction acts especially if Congress has so decided. I propose to show briefly that she has; that Congress and especially this House has so declared and that you might with as much propriety pass this bill in relation to New York or Massachusetts as in relation to Georgia.

* * * * * * * * * * *

"But beyond all that, and admitting what I deny, that you have the right to inquire into the decision of the Georgia Legislature as to the eligibility of its members, I assert—and I challenge contradiction here and now from any member of the Reconstruction Committee of this or the Fortieth Congress, or from any member of this House—that there is not one scintilla of evidence before the House taken either by it, or its committee, or in any other form to make it legal testimony before any tribunal, that a single member of either house of the Georgia Legislature was ineligible under the fourteenth amendment. I ask now who among the two hundred and seventeen members is ineligible? Name the man, the office he held before the war, the acts he committed during the war, and the testimony taken either by this House or any committee of it or by its authority, to sustain any charge against any member."

Mr. Voorhees then attacked the bill (p. 601):

"* * * But let us look a little more closely at the details of this second attempt upon the life of the State of Georgia. What are the pretexts assumed for the second destruction of this unhappy State? They are set forth in the preamble. It is there stated that the Legislature elected under the new constitution refused to purge itself of members who were disqualified by the fourteenth amendment to the Constitution of the United States. The report of General Meade, pages 8 and 9, shows this statement to be untrue. It will be seen there that as commander of the department of

the South he required steps to be taken to test the eligibility of members under the fourteenth amendment as soon as the Legislature convened. * * *"

No vote was taken on H.R. 259 in this session.

In the 2nd Session of the 41st Congress, there was introduced in the Senate S. 281, which approximated the Butler bill of the previous session (Cong. Globe, 41st Cong., 2d sess., pp. 3, 86).

Senator Morton (p. 165) moved an amendment providing that the Georgia legislature should be provisional only until it has ratified both the Fourteenth and the Fifteenth Amendments and the Senators and Congressmen from Georgia had taken their seats.

Senator Drake (p. 165) opposed, for the reason that the future validity of the amendments might be drawn in question on the ground that Georgia had ratified them under duress. Senator Thurman (pp. 166-170) asserted that the coercion of Georgia would establish a dangerous principle.

Senator Sawyer said (p. 171):

"The dominant party, who, having no other power under the Constitution than to propose an amendment to the Constitution for the acceptance or rejection of the States, have withheld them by force and thrust amendments down their throats, will hereafter find in this country, not perhaps from the states which have been the victims of that illegality directly, but from other States, the question raised as to whether an amendment so obtained has any legal, binding force upon a free and a brave people.

"The wrong is just as great to the State of Ohio, to the State of New York, and to the little State which I have the honor in part to represent upon this floor [South Carolina] as it is to those who are made the unhappy instruments for depriving themselves and others of their rightful opportunity to reject or assent, which was intended to be given to them by the Con-

stitution of our Government. A forced adoption would be no adoption. It must be free. The heart and the will must go with the act or it is void, it is duress. You say that they are free. Free to do what? Free to live under the rule of the bayonet; free to live without one thing for which this Government was created—not citizens, but subjects? Why, sir, it seems to me that towards this State the Congress is occupying the attitude of the cat towards the mouse, that plays with it before it finally puts an end to its pain. * * *"

Senator Williams, however, supported the Morton amendment (pp. 172-173), saying:

"Now, sir, a word as to the coercion imposed upon the State of Georgia by this proposed amendment. It may be called coercion or not, as you please. Georgia saw proper for reasons best known to herself to engage in a conspiracy for the dissolution of the Union; she withdrew her representation from Congress and undertook to destroy the Government of the United States; and Congress undertakes to say that before she shall resume her representation in these Halls she shall comply with certain terms and conditions which, in the judgment of Congress, are necessary for the peace and welfare of the country. That Congress has the power to impose these terms and conditions upon the rebel States is a question that I regard settled forever in this country. It is now too late to discuss or controvert the right of Congress upon that subject. Sir, it has been determined, not only by repeated decisions of the legislative department of the Government, but it has been submitted to, reviewed by, and affirmed by the American people time and again, and the doctrine has been recognized, too, by the Supreme Court of the United States in affirming that it belongs to the political department of the Government to say when a State government does or not exist within a State. * * *"

Senator Saulsbury then attacked the bill (pp. 201-204):

"* * * President Grant himself acknowledged that Georgia had done everything required of her by your

reconstruction acts of Congress. Then she was entitled to admission, if she has to come and knock at your door for admission. You are not legitimate doorkeepers in this controversy. You have no such exalted legal position as doorkeeper of the Senate of the United States. The Constitution of the United States alone guards that door, and you are usurpers if such is your greed and thirst for office as a political party that you want to become and do become doorkeepers to the Senate Chamber and House of Representatives, to keep out or to let in whom you please. Here is your President saying that Georgia has done everything required of her. Oh, but then, he says, after she did all this there were several poor negroes turned out of the Legislature; and now you who love and cherish the African race so well, you the great political humanitarians of the age, you who may find that the vote of the African race is necessary for your continuance in power, are appealed to by your chosen leader to legislate further in reference to Georgia; and lo and behold, you implicitly obey his commands, and here is a bill before us to do the bidding of the Executive! * * *"

Further debate, frequently bitter, followed (pp. 205-222). Then Senator Casserly said (pp. 223-224):

"What has Congress to do with the ratification by the States? The function of Congress is ended when it proposes. It has nothing else to do with the subject, just as the function of the President is ended, in appointing to office, when he proposes a name to you. Suppose he should surround this Chamber with an armed force and forbid you to go out for meat, drink, candlelight, or fife until you had agreed to his nominee, would that be a valid confirmation? Would that be an act of ratification which would bind anyone? Would it bind this body any longer than until the external force was removed? That is entirely too plain for argument. Therefore I say that the coercion which by the declarations of Senators is to be exerted upon Georgia whether it be expressed in the bill or omitted from it, is coercion that invalidates all ratifications which have in any substantial or material degree been affected by that coercion. * * *"

Senator Morton's amendment had originally (p. 165) provided for Sec. 8 of the pending bill to read:

> "That the legislature shall be provisional only and until after it has ratified the fourteenth and fifteenth amendments to the Constitution of the United States, and Senators and Representatives in Congress from the State of Georgia have been admitted to their seats."

Following the debate, it was modified to read,

> "That the legislature shall ratify the fifteenth amendment to the Constitution of the United States before Senators and Representatives from Georgia are admitted to seats in Congress."

Thus modified, it was adopted, 38 to 15 (p. 224), and, shortly thereafter, the entire bill passed the Senate by a vote of 45 to 9 (p. 232).

In the House, following preliminary discussion (pp. 245-247), Mr. Woodward said in the course of a long speech (pp. 255-262):

> "* * * The then member from Massachusetts, Mr. Boutwell, who brought it in and who is now at the head of the Treasury Department, declared on introducing it that it was the final consummation of a series of measures that the Republican party had contemplated. That was the 'consummation.' And the 'consummation' was in that second section, taking away from the States of this Union the power now secured to them by the Constitution of the United States to regulate suffrage, and vesting it here in the Federal Government, consolidating the entire political power in this country in the hands of this Federal Government. That is the meaning of the fifteenth amendment, and that is the reason why Massachusetts is in such hot haste to get it ratified.
>
> "Massachusetts sees very clearly how it is going to inure to her benefit to have this Congress regulate

every election district in the country. And I expect after the fifteenth amendment is adopted the honorable gentleman from Massachusetts [Mr. Butler] will bring in an election law to relieve all the states from any further attention to elections from that time forth.

* * * * * * * * *

"What this Constitution intended to secure to the people of Georgia is a republican form of government when the State of Georgia, which is the other corporation over them, has failed to furnish them with a republican form of government. But the State of Georgia has adopted the very form of government which was prescribed to them in these reconstruction acts. The President recites it; General Meade recites it; the whole history of the country shows it. * * *"

Mr. Eldridge said (p. 281):

"* * * Doubtless so long as bad government continues in Georgia under Federal intervention, social unrest, and military representation there will be crime. So there has been violence and crime in other States, and will be to the end of time; but who is to judge of its penalties? What has the Federal Congress to do with it? Where is the power under our system to deal with such violence by Federal action? Where in this is the reason of a sweeping law destroying the institutions of a whole people for the delinquency or crime of a few? We overturn not alone the Legislature, but invalidate its acts, destroy its courts, affect its judicial judgments, divorce marriages, bastardize children, uproot and overturn all the social with the political order; and all for what? A bad white senator or Radical politics is killed by a negro! This is reconstruction and the bill 'promotes' this! * * *"

Thereupon (p. 292), the bill passed the House by a vote of 121-51; it was duly signed by the President, and it became the Act of December 22, 1869, c. 3, 16 Stat. 59; see pp. 64, 65-66, *supra*.

Two months later, on February 25, 1870, Butler of Massachusetts introduced H.R. 1335, 41st Cong., 2d sess. "A Bill to admit Georgia to Representation in Congress" (p. 1570).

The debates (pp. 1701-1720) centered on the status of Georgia: Was it a State? And was it not once before already readmitted?

Mr. Bird, in opposition, waxed sarcastic (p. 1721):

> "* * * Have you looked into this Constitution with anxious undistorted eyes to determine whether or not every negro is securely provided for, so that he will not in all the coming ages, bear any unnecesary burden? Are you quite sure that he has vouchsafed to him all the inalienable, indefeasible, and everlasting rights of man, social, religious, and educational? There is no telling how soon some favoured colored individual or suddenly converted Union man or someone willing to identify his interests with her sons and sacrifice himself to a seat in Congress, may be the subject of rebellious assault or deprived of some chief pre-eminence becaure of some defect, inadvertence, or indiscretion in this Constitution. Now is the time to do or undo. There should be no fear or hesitation about completing this work so auspiciously begun."

An amendment by Mr. Bingham, reading as follows—

> "*Provided*, That nothing in this act contained shall be construed to vacate any of the offices now filled in the State of Georgia, either by the election or by the appointment of the Governor thereof by and with the consent of the senate of said State; neither shall this act be construed to extend the official term of any officer of said State beyond the term limited by the Constitution thereof dating from the election or appointment of such officers; nor to deprive the people of Georgia of the right under their constitution to elect Senators and Representatives of the State of Georgia in the year 1870; but said electron shall be held in the year 1870 either on the day named in the constitution of said State or such other day as the present legislature may designate by law,"

passed by 115-71 (p. 1770), and shortly thereafter the bill passed the House, 125-55 (P. 1771).

There followed lengthy debate in the Senate, revolving around the theme of Georgia's status (pp. 1924-1930, 1950-1960, 1987-1996, 2018-2026).

Senator Williams continued the debate on the Bingham amendment, which resolved itself into an argument over whether the existing Georgia legislature could "perpetuate itself in office" (p. 2058). Then, at p. 2059, Senator Williams quoted twice from the provisions of the Georgia constitution setting up the 44 senatorial districts (*supra*, pp. 58, 61-62), saying:

> "* * * Paragraph two of section one also has a bearing on this subject: 'The members of the senate shall be elected for four years except that the members elected at the first election from the twenty-two senatorial districts numbered in this constitution with odd numbers shall only hold their office for two years.' It will be observed that this paragraph relates expressly to the first election which takes place under the constitution and it provides that the members of the senate elected at the time shall hold their office one-half for four years and one-half for two years from that particular time and that is the time specified in the Constitution. 'The members of the senate shall be elected for four years except that the members elected at the first election from the twenty-two senatorial districts numbered in this constitution with odd numbers shall only hold this office for two years.'"

The debate continued for some time. Finally, on April 19, 1870, Senator Pomeroy offered an amendment in lieu of the Bingham amendment, in effect an entirely new bill, which provided "that the existing government in the State of Georgia is hereby declared to be provisional," and should continue under the Reconstruction Acts as a military district (supra, pp. 56-57) until an election to be held on November 15, 1870. This amendment passed, 34-24 (p.

2820), whereupon the amended bill passed shortly thereafter, 27-25 (p. 2829).

The House then concurred in the Senate's action with an amendment (p. 4797)—which changed the substance of what had been done. That amendment provided—

> "That the State of Georgia having complied with the reconstruction acts and the fourteenth and fifteenth articles of amendment to the Constitution of the United States having been ratified in good faith by a legal legislature of said State it is hereby declared that the State of Georgia is entitled to representation in the Congress of the United States. But nothing in this act contained shall be construed to deprive the people of Georgia of the right to an election for members of the General Assembly of said State as provided in the constitution thereof."

The Senate thereupon added a further amendment (p. 5583):

> "and nothing in this or any other act of Congress shall be construed to affect the terms to which any officer has been appointed or any member of the General Assembly elected as provided by the constitution of the state of Georgia."

The House concurred (p. 5586), and the measure as thus amended and re-amended became the Act of July 15, 1870, *supra*, p. 57.